



OCT 25 1960

ENTERED

F 2302

San Francisco Law Library

436 CITY HALL

No. 167352

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

3063

See Vol.
3058

No. 15871

United States
Court of Appeals
for the Ninth Circuit

CLARENCE A. KOLSTAD and ALTA A.
KOLSTAD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 270)

FILED

JUN 16 1958

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court
for the District of Montana,

No. 15871

United States
Court of Appeals
for the Ninth Circuit

CLARENCE A. KOLSTAD and ALTA A.
KOLSTAD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 270)

Appeal from the United States District Court
for the District of Montana,

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Kolstad, C. A.	35
Appeal:	
Notice of	32, 62
Statement of Points on	62, 64
Stipulation for Dismissal of	33
Attorneys, Names and Addresses of	1
Certificate of Clerk Dated January 18, 1958	549
Certificate of Clerk Dated January 29, 1958	550
Certificate of Clerk Dated February 7, 1958	552
Complaint	3
Schedule A	8
Deficiency Judgment	24
Final Judgment in Condemnation and Order Disbursing Funds	28
Motion to Set Aside Judgment	34
Notice of Appeal, Filed April 19, 1957	32
Notice of Appeal, Filed April 22, 1957	32
Notice of Appeal, Filed January 2, 1958	62
Notice of Appearance	22

INDEX	PAGE
Notice of Condemnation	15
Order Filed December 6, 1957	52
Order for Delivery of Possession	22
Resistance to Motion to Set Aside Judgment and for New Trial	47
Statement of Points on Appeal	62
Statement of Points on Appeal From Motion ..	64
Stipulation for Dismissal of Appeal	33
Transcript of Proceedings	64
Examination of the Jury ,	66
Instructions to the Jury	535
Witnesses, Defendant's:	
Carrothers, W. J.	
—direct	378
—cross	402
Holbrook, M. J.	
—direct	300
—cross	344
Kolstad, Clarence A.	
—direct	98, 152
—cross	238, 274
—redirect	267, 281
Ray, Richard Allen	
—direct	284
—cross	298

INDEX

PAGE

Witnesses, Plaintiff's:

Gau, George H.

—direct	419
—cross	429
—redirect	437

Knell, Charles

—direct	408
---------------	-----

McHale, P. R.

—direct	439
—cross	449
—redirect	453

Meissner, Joe

—direct	455
—cross	464, 497
—by the court	496
—redirect	499
—recross	500

Murray, Henry

—direct	504
—cross	531

Thuesen, Roger

—direct	416
—cross	418

Virden, Thomas

—direct	475
—cross	489

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

MESSRS. CEDOR B. ARONOW, and
ELMO J. CURE,
Attorneys at Law,
153 Main Street,
Shelby, Montana.

For Appellee:

MR. KREST CYR,
United States Attorney,
Box 396,
Butte, Montana.

MR. DALE F. GALLES,
Assistant United States Attorney,
Box 1478,
Billings, Montana.

PERRY W. MORTON,
Assistant Attorney General;

ROGER P. MARQUIS,
Chief, Appellate Section;

ELIZABETH DUDLEY,
Attorney, Dept. of Justice;
Lands Division,
Washington, D. C.

In the United States District Court
for the District of Montana,
Havre Division

Civil No. 1726

UNITED STATES OF AMERICA,

Plaintiff,

vs.

11,211.45 Acres of Land, More or Less, in the Counties of Liberty and Toole, State of Montana;
CLARENCE A. KOLSTAD, et al., and UNKNOWN OWNERS,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America at the request of the Acting Solicitor of the Department of the Interior for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is:

Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto (32 Stat. 388, 43 U.S.C., 1946 ed., sec. 371, et seq.);

Act of August 1, 1888 (25 Stat. 357, 40 U.S.C., 1946 ed., Supp. V, sec. 257), as amended;

Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1946 ed., secs. 258a-258e), and acts amendatory thereof or supplemental thereto;

Section 9 of the Act of December 22, 1944 (58 Stat. 887, 891);

Section 2 of Reorganization Plan No. 3 of 1950 (15 F.R. 3174);

Section 28 of Order No. 2509, as amended (17 F.R. 6794);

Interior Department Appropriation Act, 1955 (68 Stat. 361, 365; and,

Declaration of Taking dated April 27th, 1955, and filed herewith.

3. The public use for which said lands and interests therein are taken is the absolute fee simple title, together with all the rights and privileges incident to the use and enjoyment thereof, for the construction of a dam and appurtenant facilities, and a reservoir site all in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project.

4. The property to be taken is described in Schedule A in 7 sheets hereto attached and by reference made a part hereof.

5. The estate to be acquired in the property described in Schedule A hereto attached is the absolute fee simple title thereto, including all improvements, excepting however, and reserving to the owners thereof, their heirs and assigns, all oil, gas and other minerals except sand, gravel and other materials used in the construction of the Lower Marias Unit, together with the right to prospect for, mine and remove the same, but any rights exercised under such reservations shall be exercised in such

a manner as not to interfere with the construction, operation and maintenance of the Tiber Dam and Reservoir as may be determined by the United States, acting through the Secretary of the Interior or his duly authorized representative. It is understood that mineral-like methods shall be employed in the extraction and removal of any such oil, gas and other minerals, and that all necessary precautions shall be taken to prevent the pollution of water stored in the said Tiber Reservoir or flowing in the Marias River and it is also understood that no pollution from such operations shall affect the quality of such water for irrigation, municipal or miscellaneous uses, and the determination of the Secretary of the Interior or his duly authorized representative, acting for and on behalf of the United States with respect thereto, shall be final and conclusive. Any operations under said reservation by the owner thereof, his heirs, assignees or lessees, shall be at their sole risk.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records, and those whose names have otherwise been learned, are:

Parcel No. 10

C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife; Amerada Petroleum Corporation, a corporation; Robert C. Balsam and Mary F. Balsam, his wife; Frank H. Wasson and ——— Wasson, his wife, if any; G. A.

Thiel and ——— Thiel, his wife, if any; and, Lila Jane MacGowan, a feme sole.

Parcel No. 11

G. W. Kolstad, a single man; Amerada Petroleum Corporation, a corporation; Nick Laas, Executor of the Estate of Martin Wasesha, deceased; Thomas F. Wallace and ——— Wallace, his wife, if any; and, Wells-Dickey Company, a corporation.

Parcel No. 27

Clarence I. Underdal and Ruth Underdal, his wife; Isaac R. Denson and Mary O. Denson, his wife; and, Great Falls National Realty Company, a corporation.

Parcel No. 28

Isa E. Denson, a feme sole; Toole County, a political subdivision of the State of Montana; and, Helen L. Purdy, a feme sole; and Shadrach P. Denson and Antoinette G. Denson, his wife.

Parcel No. 29

Isa E. Denson, Executrix, and Norman M. Denson, Executor, of the Estate of Mayette E. Denson, deceased; Isa E. Denson, a feme sole; Shadrach P. Denson and Antoinette G. Denson, his wife; Isa E. Denson, Norman M. Denson, Shadrach P. Denson, and Mayette E. Denson, Jr., heirs of Mayette E. Denson, deceased; the unknown heirs and creditors of Mayette E. Denson, deceased; Marias River

Electric Cooperative, Incorporated, a cooperative;
and, The Great Falls National Bank, a corporation.

Parcel No. 31

Alton L. Knutson, a single man; Toole County, a political subdivision of the State of Montana; W. Coburn Cook and Ruth E. Cook, husband and wife; and, W. E. Buell and ——— Buell, his wife, if any.

7. The County of Liberty, State of Montana, and the County of Toole, State of Montana, may have or may claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff, and such persons are made parties to the action under the designation "unknown owners."

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded, and for such other relief as may be lawful and proper.

Dated this 23rd day of May, 1955.

KREST CYR,

United States Attorney for the
District of Montana;

/s/ DALE F. GALLES,

Assistant United States Attorney for the District
of Montana; Attorneys for Plaintiff.

Trial by jury of the issue of just compensation is demanded by the plaintiff.

/s/ DALE F. GALLES,
Assistant United States Attorney for the District
of Montana.

Designation of Service

Comes now Dale F. Galles, Assistant United States Attorney for the District of Montana, and, pursuant to Rule 34 of the Rules of Practice of the United States District Court for the District of Montana, hereby designates and consents that all subsequent papers in the above-entitled cause, except writs and process, may be made upon him, as the attorney for the plaintiff in the above-entitled cause, at the office of the United States Attorney, in and for the District of Montana, in the Federal Building, Billings, Montana.

/s/ DALE F. GALLES,
Assistant United States Attorney for the District
of Montana.

Schedule A

Land Situated in Toole and Liberty Counties,
Montana Description

Parcel No. 10

The South Half of the South Half ($S1\frac{1}{2}S1\frac{1}{2}$), of Section Eleven (11), Lots Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), the West Half of the Northeast Quarter ($W1\frac{1}{2}NE1\frac{1}{4}$),

the North Half of the Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$), of Section Thirteen (13), Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), Twelve (12), the North Half of the North Half ($N\frac{1}{2}N\frac{1}{2}$), the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}NW\frac{1}{4}$), the South Half of the Southeast Quarter ($S\frac{1}{2}SE\frac{1}{4}$), of Section Fourteen (14), except Thirteen and Fifteen Hundredths (13.15) acres of land from Lots Three (3), Seven (7), and Eight (8), of said Section Fourteen (14) known as Turner Park as described in Deed of Dedication dated March 3, 1931, recorded in Book 25 at Page 438 on March 5, 1931, in the records of Toole County, Montana, Lots One (1), Two (2), Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$), West Half of the Southeast Quarter ($W\frac{1}{2}SE\frac{1}{4}$), of Section Fifteen (15), Lots One (1), Two (2), Three (3), Four (4), Seven (7), Eight (8), Ten (10), of Section Twenty-one (21), Lots One (1), Two (2), Three (3), Four (4), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}NE\frac{1}{4}$), the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of Section Twenty-two (22), Lots One (1), Two (2), Three (3), Four (4), Five (5), the Northeast Quarter ($NE\frac{1}{4}$), the North Half of the Southwest Quarter ($N\frac{1}{2}SW\frac{1}{4}$), of Section Twenty-three (23), Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), the Southwest Quarter of the Northeast Quarter

(SW $\frac{1}{4}$ NE $\frac{1}{4}$), the South Half of the Northwest Quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$), the North Half of the Southwest Quarter (N $\frac{1}{2}$ SW $\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$), the West Half of the Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$) of Section Twenty-four (24), the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Twenty-five (25), the North Half of the Southeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$), the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Twenty-six (26), all in Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, Lots One (1), Two (2), Three (3), Four (4), the South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), the South Half (S $\frac{1}{2}$), of Section Three (3), Lots One (1), Two (2), Three (3), Four (4), South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), the South Half (S $\frac{1}{2}$), of Section Four (4), Lots One (1), Two (2), Three (3), Four (4), South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), the North Half of the Southeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$), the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$), of Section Five (5), Lot One (1) of Section Six (6), the Northeast Quarter (NE $\frac{1}{4}$), the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$), of Section Eight (8), the North Half (N $\frac{1}{2}$), the Northeast Quarter of the Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$), of Section Nine (9), the Northeast Quarter (NE $\frac{1}{4}$), the North Half of the Southeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter (SW $\frac{1}{4}$ SE $\frac{1}{4}$), of Section Ten (10), the West Half of the Southwest

Quarter ($W\frac{1}{2}SW\frac{1}{4}$) of Section Eleven (11), Lot One (1) of Section Fifteen (15), the North Half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$) of Section Seventeen (17), Lots Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Twelve (12), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Nineteen (19), Lots One (1), Two (2), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}NE\frac{1}{4}$), the East Half of the Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$), the Southwest Quarter of the Southwest Quarter ($SW\frac{1}{4}SW\frac{1}{4}$), the West Half of the Southeast Quarter ($W\frac{1}{2}SE\frac{1}{4}$) of Section Twenty (20), Lots Four (4), Five (5), Six (6), Seven (7), Eight (8), the West Half of the Northeast Quarter ($W\frac{1}{2}NE\frac{1}{4}$), the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}NW\frac{1}{4}$), the Southeast quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$), of Section Twenty-one (21), Lots Two (2), Three (3), Four (4), Five (5), the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section Twenty-two (22), the West Half of the East Half ($W\frac{1}{2}E\frac{1}{2}$) of Section Twenty-six (26), the Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}NE\frac{1}{4}$) of Section Thirty (30), all in Township Thirty (30) North, Range Four (4) East, Montana Principal Meridian, the West Half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}SE\frac{1}{4}$), of

Section Twenty-nine (29) Lots One (1), Two (2), the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}SE\frac{1}{4}$), the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$), of Section Thirty (30), the Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-one (31), the North Half ($N\frac{1}{2}$) the North Half of the South Half ($N\frac{1}{2}S\frac{1}{2}$), the South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}SE\frac{1}{4}$), of Section Thirty-two (32), the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}NE\frac{1}{4}$), the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}NW\frac{1}{4}$), the South Half ($S\frac{1}{2}$), of Section Thirty-three (33), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$), the West Half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of Section Thirty-four (34), the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) of Section Thirty-five (35), all in Township Thirty-one (31) North, Range Four (4) East, Montana Principal Meridian, containing Eight Thousand Eight Hundred Eighty-six and Seventy-nine Hundredths (8886.79) acres more or less.

Land Situated in Liberty County, Montana
Description

Parcel No. 11:

The West Half ($W\frac{1}{2}$) of Section Ten (10), Township Thirty (30) North, Range Four (4) East, Montana Principal Meridian, containing Three Hundred Twenty (320) acres, more or less, and located in Liberty County, Montana.
Land Situated in Toole County, Montana.

Description

Parcel No. 27:

Lot Four (4) of Section Seventeen (17), Lots Nine (9), Ten (10), the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Nineteen (19), Lots Three (3), Four (4), Eight (8), Eleven (11), Twelve (12), the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Twenty (20), all in Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, containing Two Hundred Ninety-seven and Ninety-eight Hundredths (297.98) acres, more or less, and located in Toole County, Montana.

Land Situated in Toole County, Montana
Description

Parcel No. 28:

The Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$), of Section Fourteen

(14), the North Half of the Northeast Quarter ($N\frac{1}{2}NE\frac{1}{4}$) of Section Twenty-three (23), Township Thirty (30) North, Range Two (2) East, Montana Principal Meridian, Lots Six (6) and Twelve (12) of Section Nineteen (19), Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, containing Two Hundred Sixty-two and Six Hundredths (262.06) acres more or less, and located in Toole County, Montana.

Land Situated in Toole County, Montana
Description

Parcel No. 29:

Lots One (1), Two (2), Four (4), Five (5), Six (6), Eight (8), the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section Twenty-three (23), Lots One (1), Two (2), Three (3), Four (4), Six (6), Seven (7), Eight (8), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$), of Section Twenty-four (24), all in Township Thirty (30) North, Range Two (2) East, Montana Principal Meridian, Lot Five (5) of Section Nineteen (19), Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, containing Five Hundred Forty-nine and Seventy-two Hundredths (549.72) acres, more or less, and located in Toole County, Montana.

Land Situated in Toole County, Montana
Description

Parcel No. 31:

Lots One (1), Four (4), Five (5), Six (6), the North Half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$), of Section Twenty (20), Lots Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}SE\frac{1}{4}$), of Section Twenty-one (21), Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$), the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$), of Section Twenty-two (22), Lot Seven (7), the South Half of the Northwest Quarter ($S\frac{1}{2}NW\frac{1}{4}$), of Section Twenty-three (23), all in Township Thirty (30) North, Range Two (2) East, Montana Principal Meridian, containing Eight Hundred Ninety-four and Ninety Hundredths (894.90) acres, more or less, and located in Toole County, Montana.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

NOTICE

To: C. A. Kolstad, Also Known as Clarence A. Kolstad, and Alta A. Kolstad, Husband and

Wife; Amerada Petroleum Corporation, a Corporation; Robert C. Balsam and Mary F. Balsam, His Wife; Frank H. Wasson and ——— Wasson, His Wife, If Any; G. A. Thiel and ——— Thiel, His Wife, If Any; Lila Jane MacGowan, a Feme Sole; G. W. Kolstad, a Single Man; Nick Laas, Executor of the Estate of Martin Wasesha, Deceased; Thomas F. Wallace and ——— Wallace, His Wife, If Any; Wells-Dickey Company, a Corporation; Clarence I. Underdal and Ruth Underdal, His Wife; Isaac R. Denson and Mary O. Denson, His Wife; Great Falls National Realty Company, a Corporation; Isa E. Denson, a Feme Sole; Toole County, a Political Subdivision of the State of Montana; Helen L. Purdy, a Feme Sole; Shadrach P. Denson and Antoinette G. Denson, His Wife; Isa E. Denson, Executrix, and Norman M. Denson, Executor of the Estate of Mayette E. Denson, Deceased; Isa E. Denson, Norman M. Denson, Shadrach P. Denson, and Mayette E. Denson, Jr., Heirs of Mayette E. Denson, Deceased; the Unknown Heirs and Creditors of Mayette E. Denson, Deceased; Marias River Electric Cooperative, Incorporated, a Cooperative; The Great Falls National Bank, a Corporation; Alton L. Knutson, a Single Man; W. Coburn Cook and Ruth E. Cook, Husband and Wife; W. E. Buell and ——— Buell, His Wife, If Any; and the County of Liberty, a Political Subdivision of the State of Montana.

You are hereby notified that a Complaint in condemnation has heretofore been filed in the office of the Clerk of the above-named Court in an action to condemn certain property described in Schedule A attached hereto and made a part hereof, for use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project.

The authority for the taking is the Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto (32 Stat. 388, 43 U.S.C., 1946 ed., sec. 371, et seq.); Act of August 1, 1888 (25 Stat. 357, 40 U.S.C., 1946 ed., Supp. V, sec. 257), as amended; Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1946 ed., secs. 258a-258e), and acts amendatory thereof or supplemental thereto; Section 9 of the Act of December 22, 1944 (58 Stat. 887, 891); Section 2 of Reorganization Plan No. 3 of 1950 (15 F.R. 3174); Section 28 of Order No. 2509, as amended (17 F.R. 6794); Interior Department Appropriation Act, 1955 (68 Stat. 361, 365); and, Declaration of Taking dated April 27th, 1955, and filed herein.

The estate to be acquired in the property described in Schedule A hereto attached is the absolute fee simple title thereto, including all improvements, excepting however, and reserving to the owners thereof, their heirs and assigns, all oil, gas and other minerals except sand, gravel and other materials used in the construction of the Lower Marias Unit, together with the right to prospect for, mine and remove the same, but any rights exercised

under such reservations shall be exercised in such a manner as not to interfere with the construction, operation and maintenance of the Tiber Dam and Reservoir as may be determined by the United States, acting through the Secretary of the Interior or his duly authorized representative. It is understood that miner-like methods shall be employed in the extraction and removal of any such oil, gas and other minerals, and that all necessary precautions shall be taken to prevent the pollution of water stored in the said Tiber Reservoir or flowing in the Marias River and it is also understood that no pollution from such operations shall affect the quality of such water for irrigation, municipal or miscellaneous uses, and the determination of the Secretary of the Interior or his duly authorized representative, acting for and on behalf of the United States with respect thereto, shall be final and conclusive. Any operations under said reservation by the owner thereof, his heirs, assignees or lessees, shall be at their sole risk.

You are further notified that the persons having or claiming an interest, or who may have or may claim an interest in the property described in Schedule A hereto attached whose names are ascertainable by a reasonably diligent search of the records, and those whose names have been otherwise learned, are:

Parcel No. 10

C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife; Amerada

Petroleum Corporation, a corporation; Robert C. Balsam and Mary F. Balsam, his wife; Frank H. Wasson and ——— Wasson, his wife, if any; G. A. Thiel and ——— Thiel, his wife, if any; and, Lila Jane MacGowan, a feme sole.

Parcel No. 11

G. W. Kolstad, a single man; Amerada Petroleum Corporation, a corporation; Nick Laas, Executor of the Estate of Martin Wasesha, deceased; Thomas F. Wallace and ——— Wallace, his wife, if any; and, Wells-Dickey Company, a corporation.

Parcel No. 27

Clarence I. Underdal and Ruth Underdal, his wife; Isaac R. Denson and Mary O. Denson, his wife; and, Great Falls National Realty Company, a corporation.

Parcel No. 28

Isa E. Denson, a feme sole; Toole County, a political subdivision of the State of Montana; and, Helen L. Purdy, a feme sole; and Shadrach P. Denson and Antoinette G. Denson, his wife.

Parcel No. 29

Isa E. Denson, Executrix, and Norman M. Denson, Executor of the Estate of Mayette E. Denson, deceased; Isa E. Denson, a feme sole; Shadrach P. Denson and Antoinette G. Denson, his wife; Isa E. Denson, Norman M. Denson, Shadrach P. Denson, and Mayette E. Denson, Jr., heirs of Mayette E.

Denson, deceased; the unknown heirs and creditors of Mayette E. Denson, deceased; Marias River Electric Cooperative, Incorporated, a cooperative; and, The Great Falls National Bank, a corporation.

Parcel No. 31

Alton L. Knutson, a single man; Toole County, a political subdivision of the State of Montana; W. Coburn Cook and Ruth E. Cook, husband and wife; and, W. E. Buell and ——— Buell, his wife, if any.

The County of Liberty, State of Montana, and the County of Toole, State of Montana, may have or may claim an interest in the property by reason of taxes and assessments due and exigible.

You are further notified that if you have any objections or defenses to the taking of this property, you are required to serve upon plaintiff's attorney at the address herein designated within twenty (20) days after service of this notice, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed, and stating all your objections and defenses to the taking of this property. Failure so to serve an answer shall constitute consent to the taking of this property and to the authority of the Court to proceed to hear the action and to fix the just compensation, and shall constitute a waiver of all defenses and objections not so presented.

You are further notified that if you have no objection or defense to the taking, you may serve upon

plaintiff's attorney a notice of appearance designating the property in which you claim to be interested, and thereafter you shall receive notice of all proceedings affecting the said property.

Trial by jury of the issue of just compensation is demanded by plaintiff. You are further notified that at the trial of issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have any interest, and you may share in the distribution of the award of compensation.

Dated this 24th day of May, 1955.

KREST CYR,

United States Attorney for the
District of Montana;

/s/ DALE F. GALLES,

Assistant United States Attorney for the District of
Montana.

Schedule A

[Schedule A attached to the foregoing is identical to Schedule A attached to the Complaint. See pages 8 to 15.]

Returns on Service of Writs attached.

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

ORDER FOR DELIVERY OF POSSESSION

This action coming on for hearing (ex parte) upon motion of plaintiff for an order for the surrender of possession of the property described in the Complaint filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It Is This Day Ordered that all defendants to this action and all persons in possession and control of the property described in the Complaint filed herein and further described in the Notice of condemnation to be served on all such parties, shall surrender possession of the said property immediately, to the extent of the estate being condemned by the United States, as set forth in said Notice of Condemnation.

It Is Further Ordered that a copy of this order shall be served forthwith on all persons in possession or control of said property and that the Notice of Condemnation shall be served simultaneously with said copy of this Order upon all persons in possession or control of the property described.

Dated this 24th day of May, 1955.

/s/ W. D. MURRAY,

United States District Judge.

Returns on Service of Writs attached.

[Endorsed]: Filed and entered June 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEARANCE

To The United States of America, and to Mr. Krest Cyr, United States Attorney for the District of Montana, and to Mr. Dale F. Galles, Assistant United States Attorney for the District of Montana.

You are hereby notified that we the undersigned, Clarence A. Kolstad and Alta A. Kolstad of Chester, Montana, do hereby make our appearance in the above action.

That we are the owners of the land described in said action as parcels ten and eleven of schedule A, which description is hereto attached.

That we are not satisfied with the money offered for this land as it is far below the present values in the community.

We ask that you notify us of all proceedings affecting this property.

Dated this 14th day of June, 1955.

/s/ CLARENCE A. KOLSTAD,

/s/ ALTA A. KOLSTAD.

Schedule A

[Schedule A, parcels ten and eleven, are identical to Schedule A attached to the Complaint, see pages 8 to 15.]

[Endorsed]: Filed June 14, 1955.

[Title of District Court and Cause.]

DEFICIENCY JUDGMENT

The plaintiff having filed its Complaint herein and defendants C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife, having been served with process as is required by law and having thereafter appeared at the time set for trial of the issue of just compensation as to Parcels 10 and 11 on January 17, 1957, with their attorneys of record, and there having alleged they were the owners of the land described as Parcels No. 10 and 11 more particularly described in Schedule A hereto attached and by reference made a part hereof, which said parcels were taken and condemned by the United States of America for use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project; all other parties and persons named in the Complaint as defendants and having a possible interest in the lands described as Parcels No. 10 and 11 were duly served with process, but all of said parties and persons failed to appear herein and the default of all such parties and persons having been duly entered; and thereafter the case against said above-named defendants having been set for trial as to the issue of just compensation to be paid for the lands belonging to said defendants; and the Court having ordered the trial of Parcels No. 10 and 11 involved herein segregated from the remaining parcels for trial; and a jury having been duly em-

paneled and sworn on the 12th day of December, 1956, and said trial having been recessed and resumed on January 17, 1957, to try the issues in said cause as to Parcels No. 10 and 11, and after hearing the testimony of witnesses for the plaintiff and the defendants, and after arguments of counsel and instructions of the Court, the jury did retire for deliberation, and after deliberating did on the 21st day of January, 1957, return into this Court three (3) verdicts in words and figures as follows:

“We, the jury duly empaneled and sworn in this cause, hereby award the defendant Clarence A. Kolstad, as just compensation in this cause the sum of two hundred thirty and two thousand seven hundred thirty dollars (\$232,730.00) for the taking of this land.

“R. V. UMSTED,
“Foreman.

“We, the jury duly empaneled and sworn in this cause, hereby award the defendants Clarence A. Kolstad and Alta A. Kolstad, jointly, in this cause as just compensation the sum of one hundred ninety-one thousand twenty-four dollars (\$191,024.00) for the taking of their land.

“R. V. UMSTED,
“Foreman.

“We, the jury duly empaneled and sworn in this cause, hereby award the defendant Alta A. Kolstad as just compensation in this cause the sum of ninety-

six thousand nine hundred ninety-two dollars (\$96,992.00) for the taking of her land.

“R. V. UMSTED,
“Foreman.”

And It Appearing to the Court that defendants C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife, are the former owners of the lands described as Parcels No. 10 and 11 more particularly described in Schedule A hereto attached and by reference made a part hereof,

And It Further Appearing to the Court that heretofore and simultaneously with the filing of the Declaration of Taking and Complaint in condemnation in this cause on the 24th day of May, 1955, the United States of America deposited into the Registry of this Court the following sums for the taking of the respective parcels belonging to the above-named defendants, and for the use and benefit of the persons entitled thereto:

Parcel No.	Amount Deposited
10	\$226,849.20
11	6,800.00

Now, Therefore, the Court being fully advised in the premises, and by reason of the verdicts of the jury,

It Is Hereby Ordered, Adjudged and Decreed that the just compensation for the taking of the respective property of C. A. Kolstad, Alta A. Kol-

stad and C. A. Kolstad and Alta A. Kolstad, jointly, being Parcels No. 10 and 11, is the sum of \$520,-746.00.

It Is Further Ordered, Adjudged and Decreed that the plaintiff deposit into the Registry of the Court the sum of two hundred eighty-seven thousand ninety-six and 80/100 (\$287,096.80) dollars, being the difference between the amounts heretofore deposited and the amounts of just compensation fixed by this judgment, with interest at the rate of six per cent (6%) per annum from May 24, 1955, until said sum is paid into the Registry of the Court.

It Is Further Ordered, Adjudged and Decreed that all monies deposited herein and to be deposited pursuant to this judgment be subject to disbursement as provided for by further order of this Court.

Dated this 26th day of January, 1957.

/s/ W. D. MURRAY,
United States District Judge.

Schedule A

[Schedule A, parcels ten and eleven, are identical to Schedule A attached to the Complaint, see pages 8 to 15.]

[Endorsed]: Filed January 26, 1957.

Entered and noted January 28, 1957.

[Title of District Court and Cause.]

FINAL JUDGMENT IN CONDEMNATION
AND ORDER DISBURSING FUNDS

This case having been brought by the filing of a Complaint and the defendants above named, and each of them, having been served with process as required by law, and defendants Clarence A. Kolstad and Alta A. Kolstad, his wife, having appeared at the time set for the trial with their attorneys of record, and all other defendants, and each of them herein, having defaulted, and their defaults having been duly entered, notice of trial of this cause was issued by the Clerk and given to the appearing defendants as provided by law; and thereafter the case against said above-named defendants having been set for trial as to the issue of just compensation to be paid for the lands belonging to said defendants; and the Court having ordered the trial of Parcels No. 10 and 11 involved herein segregated from the remaining parcels for trial; and a jury having been duly empaneled and sworn on the 12th day of December, 1956, and said trial having been recessed and resumed on January 17, 1957, to try the issues in said cause as to Parcels 10 and 11; said jury returned its verdicts on the 21st day of January, 1957, awarding the defendants as just compensation in this cause the sum of \$520,746.00.

And It Further Appearing that defendants Clarence A. Kolstad and Alta A. Kolstad, his wife, are the former owners of the lands described as Parcels

No. 10 and 11 more particularly described in Schedule A hereto attached and by reference made a part hereof, and are the only persons entitled to payment of compensation therefor,

And It Further Appearing to the Court that heretofore and simultaneously with the filing of the Declaration of Taking and Complaint in condemnation in this cause on May 24, 1955, the United States of America deposited into the Registry of this Court the following sums for the taking of the respective parcels belonging to the above-named defendants, and for the use and benefit of the persons entitled thereto:

Parcel No. 10.....\$226,849.20

Parcel No. 11..... 6,800.00

that pursuant to the verdicts of the jury as to Parcels 10 and 11 a deficiency judgment was entered on January 28, 1957, whereby the sum of \$287,096.80 with interest thereon at the rate of 6% per annum from May 25, 1955, until said sum is paid into the Registry of the Court, was ordered to be paid into the Registry of the Court.

And It Further Appearing that the sum of \$287,-096.80, representing the amount of the deficiency judgment as to Parcels No. 10 and 11 was paid into the Registry of the Court on March 5, 1957, with interest thereon as above stated,

Now, Therefore, upon motion of Krest Cyr, United States Attorney for the District of Montana, and Dale F. Galles, Assistant United States Attor-

ney for the District of Montana, attorneys for the plaintiff herein, for entry of a Final Judgment in Condemnation and Order Disbursing Funds herein, and the Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the full and complete just compensation for the taking of the property of the defendants Clarence A. Kolstad and Alta A. Kolstad, his wife, more fully described in Schedule A hereto attached and by reference made a part hereof, is the sum of \$520,746.00.

It Is Further Ordered, Adjudged and Decreed that there is vested in the United States of America the following estates: The estate to be acquired in the property described in Schedule A hereto attached and by reference made a part hereof is the absolute fee simple title thereto, including all improvements, excepting however, and reserving to the owners thereof, their heirs and assigns, all oil, gas and other minerals except sand, gravel and other materials used in the construction of the Lower Marias Unit, together with the right to prospect for, mine and remove the same, but any rights exercised in such a manner as not to interfere with the construction, operation and maintenance of the Tiber Dam and Reservoir as may be determined by the United States, acting through the Secretary of the Interior or his duly authorized representative. It is understood that miner-like methods shall be employed in the extraction and removal of any such oil, gas and other minerals, and that all necessary precautions shall be taken to prevent the pollution

of water stored in the said Tiber Reservoir or flowing in the Marias River and it is also understood that no pollution from such operations shall affect the quality of such water for irrigation, municipal or miscellaneous uses, and the determination of the Secretary of the Interior or his duly authorized representative, acting for and on behalf of the United States with respect thereto, shall be final and conclusive. Any operations under said reservation by the owner thereof, his heirs, assignees or lessees, shall be at their sole risk.

It Is Further Ordered, Adjudged and Decreed that the lands hereinabove described are condemned for the public use, to wit: For use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project.

It Is Further Ordered, Adjudged and Decreed that the sum of \$551,422.10 now on deposit in the Registry of the Court for the taking of Parcels No. 10 and 11 involved herein be disbursed to Clarence A. Kolstad and Alta A. Kolstad, his wife, c/o Wiggenhorn, Hutton, Schiltz and Sheehy, Attorneys at Law, Electric Building, Billings, Montana, and the Clerk will make distribution accordingly.

Dated this 7th day of March, 1957.

/s/ W. D. MURRAY,

United States District Judge.

Schedule A

[Schedule A, parcels ten and eleven, are identical to Schedule A attached to the Complaint, see pages 8 to 15.]

[Endorsed]: Filed and entered March 8, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clarence A. Kolstad and Alta A. Kolstad, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on the 7th day of March, 1957.

Dated this 18th day of April, 1957.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY,

By /s/ JOHN M. SCHILTZ,
Attorneys for Appellants.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clarence A. Kolstad and Alta A. Kolstad, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment designated as

Deficiency Judgment made and entered in the above-entitled action on the 26th day of January, 1957.

Dated this 22nd day of April, 1957.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY,

By /s/ R. G. WIGGENHORN,
Attorneys for Appellants.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

STIPULATION FOR DISMISSAL OF APPEAL

The plaintiff having appealed to the United States Court of Appeals for the Ninth Circuit from the Deficiency Judgment of this Court entered on January 8, 1957, as to Parcels Nos. 27, 28, 29 and 31 of the above-entitled action, by Notice of Appeal filed March 7, 1957, and the appeal not yet having been docketed in the Court of Appeals, the parties stipulate pursuant to Rule 73(a) of the Federal Rules of Civil Procedure, that the appeal is hereby dismissed, subject to the approval of this Court.

Dated this 17th day of May, 1957.

KREST CYR,
United States Attorney for the
District of Montana;

By DALE F. GALLES,
Assistant United States Attorney, Attorneys for
Plaintiff.

SWANBERG & SWANBERG,
RAY F. KOBY,
CARTER WILLIAMS,

By RANDALL SWANBERG,
Attorney for Defendant Owners of Parcels Nos. 27,
28, 29 and 31.

Approved:

W. D. MURRAY,
United States District Judge.

Attest: A True Copy.

[Seal] E. WARREN TOOLE,
Clerk;

By /s/ ELIZABETH C. McKEE,
Deputy.

[Endorsed]: Filed May 21, 1957.

[Title of District Court and Cause.]

MOTION TO SET ASIDE JUDGMENT

Clarence A. Kolstad, also known as C. A. Kolstad, and Alta A. Kolstad, Defendants, in the above-entitled action, move the Court for an Order setting aside the Judgment in this case and permitting them to introduce evidence on the issue of just compensation upon the following grounds:

On March 7th, 1957, Judgment was entered in the above-entitled cause against these Defendants; the case was tried on the theory of three separate owner-

ships when in truth and in fact, the property was owned by these defendants as tenants in partnership; that through surprise, mistake and excusable neglect, these defendants were unable to show this ownership; that since the entry of Judgment, these defendants have discovered new evidence. The Motion will be further based on the affidavit of C. A. Kolstad, evidence to be introduced at the hearing on the Motion, and on the records and files in the above-entitled action.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,
Attorneys for Defendants.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Toole—ss.

C. A. Kolstad, also known as Clarence A. Kolstad, being first duly sworn, upon oath, deposes and says:

That he is one of the defendants in the above-entitled action and the husband of the defendant, Alta A. Kolstad, whose maiden name was Alta A. Worden.

That this action was tried on the 17th day of January, 1957, at Havre, Montana, and Judgment was entered in favor of the Plaintiff and against the Defendants for the condemnation of the lands described in Plaintiff's Complaint and the Defendants, C. A. Kolstad and Alta A. Kolstad, were awarded the sum of \$551,422.10 as just compensation for the lands taken including severance damages to the lands remaining.

Since the entry of said Judgment, Deponent has discovered certain new evidence which evidence could not have been discovered at the time of the trial of said cause as will more fully appear as set forth hereinafter together with the description of the evidence newly discovered.

That your Deponent and Alta A. Kolstad were married on the 7th day of June, 1931, and began working towards the establishment of a partnership between themselves in the farming and ranching business; that prior to said marriage, the defendant, Alta A. Kolstad, then known as Alta Ann Worden, taught school and during the years that she taught school, she had saved various sums of money some of which was deposited in the Securities Savings and Loan Association of Billings, Montana, and some in postal savings, a statement from Security Building and Loan Association showing deposits and withdrawals is attached hereto marked Exhibit "1" and made a part of this affidavit; that during the first years of your deponent's marriage, he was Under-Sheriff of Liberty County, Montana, and

farmed a small amount of acreage; that the defendant, Alta A. Kolstad, withdrew the funds which she had in savings, both Building and Loan and Postal savings, and made them available for the joint use of your Deponent and the Defendant, Alta A. Kolstad, which money was used to purchase farm machinery and farm lands and the proceeds from the joint farming operations of the Deponent and his wife as well as the money that the defendant, Alta A. Kolstad, had in savings, were used to purchase lands in the name of Alta A. Kolstad until the land owned by the Defendant, Alta A. Kolstad, approximately equaled the land owned by your Deponent; and, thereafter, your Deponent and his wife, operated their farm lands on a partnership basis and it was the intention of the Deponent and his wife, Alta A. Kolstad, that all of the lands purchased by them should be owned by them as tenants in partnership, and thereafter they operated as partners and each one filed a separate income tax return until the year 1943 when the parties hereto filed a partnership return because of their joint operations and all land standing in the name of C. A. Kolstad individually or Alta A. Kolstad individually, or jointly by the two of them, was all considered as jointly owned and partnership property; depreciation schedules were taken in the partnership income tax returns on machinery, buildings, improvements including fences, casing in water wells whether located on land standing in the individual names of your deponent or Alta A. Kolstad, or the two of them jointly as if all lands were owned jointly and

all property was owned jointly by the partnership consisting of your deponent and his wife, Alta A. Kolstad, and all of the lands were treated as one unit belonging to the partnership and no segregation of grain grown was made but all proceeds were deposited to the partnership account in the Citizen's Bank of Montana at Havre, Montana. A letter from Citizen's Bank of Montana showing the opening of the partnership account is attached hereto marked Exhibit "2" and made a part of this affidavit; that subsequent to 1943 and prior to 1956, the Internal Revenue Department of the United States checked the partnership returns of your deponent and his wife, Alta A. Kolstad, and found nothing wrong in their method of handling the property and the income therefrom as partnership assets and found that each had equal interest and equity in the land operated and considered owned by the partnership; that your Deponent was told by Internal Revenue men who examined the partnership accounts that the reason for the examination was the decision in Commissioner v. Culbertson, 337 U.S. 733; 69 S. Ct. 1210, and that your deponent and his wife, Alta A. Kolstad, had a true partnership and not a family partnership.

All of the taxes and insurance premiums on the lands and buildings, on all of the lands whether standing in the individual names of Deponent and his wife, or in their names jointly, were paid from the partnership bank account; at no time was any rent paid to an individual partner in whose name

the land stood for the use of the land by the partnership. Attached hereto and made a part of this affidavit and marked Exhibit "3" is a letter from the accounting firm of Finley, Renman & Misfeldt, Certified Public Accountants of Great Falls, Montana, who have looked after your Deponent's income tax and audited his books for a number of years and which letter points out that there has been a partnership operation and intention to own the lands involved in this action in a partnership between your Deponent and his wife, Alta A. Kolstad, and such funds awarded in this action when accepted by your Deponent and his wife, Alta A. Kolstad, are to be deposited to the partnership account.

That on or about January 4, 1943, your affiant made a down payment to the Federal Land Bank of Spokane to purchase what is known as the Washesha Ranch from funds made available by the Citizen's State Bank of Havre through the First State Bank of Chinook as the proceeds of a loan on wheat belonging jointly to C. A. Kolstad and Alta A. Kolstad, the title to which ranch was taken in the individual name of C. A. Kolstad but it was the intention of the parties that this ranch be owned by the partnership.

That thereafter, in the early part of 1943, your affiant negotiated with John Sailer for the purchase of the Sailer Ranch and a contract was entered into, and that thereafter, upon the examination of the abstracts, your affiant on May 15, 1943, wrote

two checks to John Sailer as a down payment for the purchase of the Sailer Ranch, the title to which was taken in the name of Alta A. Kolstad but it was the intention of the parties that this ranch be owned by the partnership. The down payment for the Sailer Ranch and all subsequent payments were made from the joint checking account maintained by C. A. Kolstad and Alta A. Kolstad in the Citizens Bank of Montana at Havre, Montana.

That in the fall of 1945, your affiant negotiated for what is known as "The Turner Ranch," owned by Paul Wolk of Cut Bank, Montana, and on October 8, 1945, your affiant wrote a check upon the Citizens Bank of Montana at Havre, Montana, on the joint checking account maintained by C. A. Kolstad and Alta A. Kolstad for the down payment on the Turner Ranch, the title to which ranch was taken in the joint names of C. A. Kolstad and Alta A. Kolstad, it being the intention of the parties that this ranch be owned by the partnership, and all subsequent payments on the purchase of the Turner Ranch were made from the joint account of the partnership.

That the wife of your affiant has been in ill health for the past few years and approximately a year ago took a turn for the worse and has been constantly under medical and nursing care; that your affiant has had to be away a great deal of the time looking after and trying to alleviate the condition of Alta A. Kolstad and it was impossible for the said defendant, Alta A. Kolstad, to testify at the

trial of the instant action and her being in Havre at the time of the trial had an injurious effect upon her health. A letter from her attending physician is attached hereto marked Exhibit No. "4" and is made a part of this affidavit.

That in the fall of 1952, an oil and gas lease was taken on approximately 9,000 acres of land belonging to the Defendants Kolstad by William B. Chebul as lease broker for Amerada Petroleum Corporation and the bonuses as well as the delay rentals under said oil and gas lease were deposited in the partnership account. A photostatic copy of such oil and gas lease showing the recorded data and the description of the lands leased is attached hereto marked Exhibit No. "5" and made a part of this affidavit. The title examiners for Amerada Petroleum Corporation approved the title on these lands as partnership property in accordance with the intent of the lessors and the defendants herein.

Your Deponent at the time of the trial of the above action was foreclosed from making an offer of proof as to partnership ownership of all of the lands involved as appears more fully in the transcript; that in addition, your Deponent finds that he is faced with a serious income tax problem and the impossibility of segregating the funds on individual ownership of said lands and may be in conflict between the decision of the Court and the holdings of the Internal Revenue Bureau.

Since the year 1953, the Kolstad boys, the sons of your Deponent and his wife, Alta K. Kolstad,

namely, Galen Kolstad, Clark Kolstad and Harley Kolstad, have operated the lands belonging to the partnership between your Deponent and his wife, Alta A. Kolstad, whether such lands stand in the individual names or the joint names of the respective partners, under lease wherein the three sons perform all of the farming operations and supply all of the machinery and remit to the partnership of your deponent and Alta A. Kolstad, two-fifths of the crop grown and harvested on the lands, free of cost, in the nearest elevator or in such storage bins as the partnership may designate. The Kolstad Brothers have been in open and notorious possession of the lands since the year 1953 and as Lessees are necessary and proper parties to this litigation.

That at the trial of the above-entitled action at Havre, Montana, one Joe Meissner who is one of the Meissner Brothers that leased the Kolstad holdings from the years 1947 to 1953, testified as to the production records of said lands. The lease for all of the said lands was given by C. A. Kolstad and Alta A. Kolstad with no distinction as to ownership and all rentals were paid to C. A. Kolstad as business manager for the partnership of himself and his wife, and deposited by him to the partnership bank account, a copy of said lease is attached hereto marked Exhibit No. "6" and by this reference made a part of this affidavit; that the said Joe Meissner testified at the trial of the instant action that he farmed the lands and knew what the production thereof was; that Joe Meissner testified that

in the year 1952, that the yield per acre dropped down to around 13 bushels and that in the year 1953, the production was around 22 bushels per acre; that your affiant made an independent investigation over a period of some two months time at all of the elevators from which your affiant received crop rental checks for the year 1952 and the year 1953 during the time that Meissner Brothers were leasing said lands and finds that in the year 1952, the average yield per acre based upon the number of bushels marketed by Meissner Brothers on which rental was paid to your affiant and his wife amounted to 16 bushels to the acre; that the same investigation was made for the year 1953 and the actual average yield was 24 bushels to the acre instead of 22 as testified by Joe Meissner. Attached to this affidavit and marked Exhibit No. "7" is the acres of crop planted for the years 1952 and 1953 on the Kolstad land by Meissner Brothers certified by the Agricultural Stabilization and Conservation Office at Chester, Montana. Also attached hereto marked Exhibits Nos. "8" and "9" are the elevator statements showing the bushels marketed and the rental paid to Kolstad for the years 1952 and 1953. That all of the above bushels per acre given in this paragraph do not take into account the fact that Meissner Brothers saved out nearly a bushel an acre of wheat for next year's crop seed. It being the custom and the practice to plant between 40 and 50 pounds of wheat to the acre and a bushel of wheat weighs 60 pounds.

That your affiant had no way of knowing that Joe Meissner would give materially incorrect testimony as to the average yield per acre from the Kolstad lands and that affiant could not have by the exercise of reasonable diligence been prepared to meet such erroneous material testimony; that the misstatement of Joe Meissner is material in that it lowered the cash income from said lands during the years 1952 and 1953 by a little over \$21,000.00 and would thus reduce the value of the lands of your deponent and the defendant, Alta A. Kolstad, operated and owned as co-partners because the income received from said lands has a direct and important bearing upon what a willing buyer would pay for such lands in the event of the sale and thus would increase the value of said lands.

That the witness, Joe Meissner, also testified as to the acquisition of some land from one John Brinkman lying some 16 miles southeast of the lands of the defendants Kolstad, which testimony was used by the government to contradict the valuation placed upon the Kolstad lands by your affiant and the defendant's witnesses; that by the exercise of due diligence, your affiant could not and was not able to get such testimony at the time of trial but since has discovered that the transaction between John Brinkman and Meissner Brothers was not an arm's length transaction nor one made upon the open market but was a sale based and the price determined upon friendship rather than the market value; the affidavit of John Brinkman marked Ex-

hibit No. "10" is attached hereto and made a part of this affidavit.

Attached hereto as Exhibit No. "11" is a photostatic copy of the partnership income tax return for the year 1946 and as Exhibit No. "12" is attached the photostatic copy of the partnership income tax return for the year 1954 and by this reference made a part of this affidavit. The income tax returns for the years in between and for the year 1955 indicate as stated above, that all of the improvements on the property whether held in the names of the partners individually or jointly were included on the partnership depreciation schedule.

That before said trial, the Deponent used due diligence to obtain all of the testimony necessary to support the issue on his part; the testimony of Joe Meissner could not be met in any short time and it took your deponent several months to track down the amount of grain sold by Meissner Brothers from the Kolstad holdings and likewise, your deponent had no opportunity to talk to Mr. John Brinkman to inquire as to the land sale between him and Meissner Brothers and that Mr. Brinkman because of his close relationship to Meissner Brothers was reluctant to furnish the affidavit, Exhibit No. "10" until the force and effect of the testimony of Joe Meissner as to the value of the Kolstad holdings was explained to Mr. Brinkman and he readily admitted that the Kolstad lands blocked out as they were in a large unit were better lands and worth

more money than the price that Mr. Brinkman asked Meissner Brothers and Mr. Brinkman realized that his own lands were worth more money than he asked from the Meissner Brothers and that upon the trial, your deponent was unable to produce any witnesses to prove the facts alleged in this affidavit or to testify himself as he did not have the information needed as to some of the things and was not permitted by the Court to testify as to the other matters.

The newly discovered evidence could not by due diligence be discovered in time to move for a new trial under Rule 59 (b) of the Federal Rules of Civil Procedure. The newly discovered evidence has a material bearing upon the issue involved in this case because (1) the Joe Meissner testimony as to a comparable sale as to the land he purchased from John Brinkman reduced the value of the lands of your Deponent and Alta A. Kolstad; (2) the testimony of Joe Meissner as to the amount of production from the lands of the defendants Kolstad during the time that Meissner Brothers had said lands leased did not reflect the true production and materially reduced the value of the lands of these defendants as it reduced the income derived from said lands by some \$21,000.00; (3) that at the trial by proceeding as to three separate tracts of land instead of one large unit of operation, the amount of just compensation and severance damage to the remaining land was greatly reduced to the detriment of your Deponent and his wife, Alta A. Kol-

stad, and (4) that necessary and proper parties were not named and made defendants in the suit.

/s/ C. A. KOLSTAD.

Subscribed and Sworn to before me this 31st day of October, A.D. 1957.

[Seal] /s/ BERNICE DAHL LUTZ,
Notary Public for the State of Montana, Residing
at Shelby, Montana.

My commission expires March 16, 1960.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

RESISTANCE TO MOTION OF DEFENDANTS
CLARENCE A. AND ALTA A. KOLSTAD
FOR AN ORDER SETTING ASIDE THE
JUDGMENT AND FOR NEW TRIAL

Plaintiff above named acting by and through Krest Cyr, United States Attorney, and Dale F. Galles, Assistant United States Attorney, respectfully resists and opposes the motion of defendants Clarence A. Kolstad and Alta A. Kolstad for an order setting aside the judgment in this action and for a new trial.

Separate Ownerships

At the trial of this action in Havre which commenced on December 12, 1956, defendant Clarence

A. Kolstad was the first witness to testify. After he had testified about an hour and in response to his then attorney's questioning, Kolstad stated his wife bought the Sailer ranch, he bought the Washesha ranch and that they jointly bought the Turner ranch. It was at this point that the jury was excused and the Court questioned the evidence as to value of their entire holdings when it was then obvious that there were separate ownerships as testified to by Mr. Kolstad. Thereupon the trial recessed until the next morning when Mr. Ralph G. Wiggenhorn, one of counsel and apparently chief counsel, moved the Court for a continuance to establish and separate the various ownerships of land and to permit the witnesses to prepare for trial under the theory of separate valuations for the separate ownerships. All attorneys and valuation witnesses came to the trial prepared to offer and hear offered evidence of a single value for the aggregate acreage even though under separate ownerships.

At that time the Court allowed Mr. Wiggenhorn one week within which to submit a brief on his contention that one value can be put on separate ownerships. No brief was submitted and the trial proceeded upon the theory that separate ownerships required separate values, even though all ownerships are farmed as one unit.

Counsel for defendants now state as one of the grounds for vacating the judgment and granting a new trial that they have newly discovered evi-

dence to show a common ownership of all the parcels. It is submitted that the supporting affidavit does nothing more than show there was a single operation on the separate parcels, which at all times has been recognized by both parties and the Court. It was pointed out by the Court during the arguments on December 12 and 13, 1956, on this point that if four contiguous farmers not related by blood or marriage deemed it more profitable to farm their separate ownerships as one unit by tearing down the fences and farming in longer strips, the law would require separate valuations on each ownership in the event all were being condemned. The analogy is sound and applies to the instant case and motion. In addition all facts were known to defendants at the time of trial.

Newly Discovered Evidence

The comparable sale of John Brinkman to Joe Meissner is now under attack by defendants' motion and the supporting affidavit at the top of page 7 states that the transaction was not at arm's length then refers to the affidavit of Brinkman attached thereto. John Brinkman was subpoenaed by the government and was in and about the courtroom during the course of the trial in January, 1957. The defendants and their then counsel had an opportunity to talk to Mr. Brinkman if they had chosen. In any event his testimony could have been used on rebuttal, if at the time of trial Joe Meissner's testimony was doubted or could have been proved false.

The bare affidavit of Brinkman without the privilege of cross-examining him is at this late date of little value in connection with its intended purpose.

As stated in *Gill v. United States* (1950), C.A. 2, 184 F. 2nd 49, 55:

“This motion being in the nature of one for a new trial based upon newly discovered evidence, it is essential at least that the evidence sought to be introduced is such that it would probably change the result.”

It is difficult to conceive that the Brinkman-Meissner comparable sale would have changed the result, even though Brinkman might have been called to say it sold for $\frac{1}{2}$ its real market value.

The supporting affidavit to the instant motion states that for the year 1952 while Joe Meissner had defendants' land under lease the average production was 16 bushels per acre instead of 13 bushels per acre as Meissner testified. Affiant reaches his conclusion by adding the elevator tickets and dividing by the number of acres reported to have been seeded according to the A. S. C. office of Liberty County. This procedure is by no means conclusive since Meissner may have had more acres seeded than he reported to that federal agency and the record will show that some of Kolstad's land is in Toole County. The seeded acres in Toole County are not shown. It is believed the total acreage owned

by either or both defendants—Kolstads in Toole County was nearly 12 sections although no doubt much of it was not seeded in 1952 or 1953. As to 1953 the difference in production averages between Meissner's testimony and Kolstad's affidavit is 22 bushels per acre versus 24 bushels per acre. And even if Toole County were not involved there is no showing the larger yields would have changed the result.

Necessary and Proper Parties

The evidence adduced at the trial, as it is recalled, did not in any way indicate that the sons of Clarence A. and Alta A. Kolstad had an interest in the real estate by lease or otherwise. It did appear that said sons had an interest in the wheat ranching operations, but that is of no moment, since it was the land being condemned and not the farming operation or business.

The Kolstad sons were not known by the government to have had an interest or to have claimed an interest in the land involved and would therefore come under the designation of "Unknown owners." At least one and it is believed two of the Kolstad sons were present at the beginning of the trial and also at practically all stages thereof. Such being the case, they had notice, failed to make their claim known and as a consequence were defaulted even if they in fact had an interest in the land. Defendants Clarence A. and Alta A. Kolstad, in any event, are not the proper parties to raise such a point.

Dated this 18th day of November, 1957.

/s/ KREST CYR,

United States Attorney.

[Endorsed]: Filed November 18, 1957.

[Title of District Court and Cause.]

ORDER

Clarence A. Kolstad and Alta A. Kolstad, defendants in a condemnation case brought by the United States, filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside the judgment on November 14, 1957. Prior thereto and on April 19, 1957, the same defendants filed a notice of appeal in the cause and said appeal is still pending.

The first problem to be considered in connection with the motion to set aside the judgment is whether or not this Court has jurisdiction to consider said motion in view of the fact that upon the filing of the notice of appeal jurisdiction of the case passed from this Court to the Court of Appeals.

While it is obvious from a reading of Rule 60(b) that a motion to set aside a judgment is authorized even when the case is pending on appeal, no procedure is established by the Rule for the handling of such motion. So far as this Court can find the Court of Appeals for the Ninth Circuit has not con-

sidered the problem of what should be done with a Rule 60(b) motion in a case which is before the Court of Appeals on appeal. However, the problem has been considered by the Court of Appeals for the District of Columbia in *Smith v. Pollin*, 194 Fed. (2d) 349, and by the Court of Appeals for the Fifth Circuit in *Ferrell v. Trailmobile, Inc.*, 223 Fed. (2d) 697. The holding in those cases is that while a District Court has no authority to grant a Rule 60(b) motion in a case which is on appeal, it does have jurisdiction to consider and deny such motion; and if the District Court, upon considering such motion, indicates that it would grant the motion, the appellant should then move in the Court of Appeals to remand the case to the District Court in order that the District Court may grant the motion. This procedure seems to the Court to be reasonable and proper to secure the just, speedy and inexpensive determination of a Rule 60(b) motion, and the Court will proceed to consider said motion.

The first ground of the motion to set aside the judgment is that the case was tried and just compensation awarded on the basis that the property condemned consisted of three separate ownerships, whereas in truth and in fact the property was owned by the defendants as tenants in partnership and that through surprise, mistake and excusable neglect these defendants were unable at the trial to show such ownership.

A consideration of this ground of the motion requires a brief outline of the history of the case.

Some 9,000 acres of land were taken by the government out of a total of approximately 17,000 acres owned by the defendants Clarence A. and Alta A. Kolstad. Of this 17,000 acres the legal title to approximately 5,000 acres stood in the name of Clarence A. Kolstad, the legal title to another 5,000 acres stood in the name of Alta A. Kolstad, and the legal title to the remaining acreage stood in the name of Clarence A. and Alta A. Kolstad as joint tenants. The evidence showed that the entire 17,000 acres was operated as a unit. Some land out of each ownership was included in the 9,000 acres taken and after the taking some land remained in each of the ownerships.

Trial on the issue of just compensation in the case was originally set for the month of February, 1956, at Glasgow, Montana. At that time a motion for continuance was made on behalf of the defendants Kolstad upon the ground that Mrs. Kolstad was ill and unable to attend the trial, and that as she owned one parcel of land herself and owned jointly with her husband another parcel, a continuance would be proper in order that she could appear at the trial. The motion was granted. Thereafter the case was again set for trial in the month of December, 1956, at Havre, Montana. Shortly before the date set for trial, the defendants Kolstad desired to discharge their then counsel and substitute new counsel. The original counsel declined to withdraw from the case until provision was made for the payment of their fee, and a hearing was had upon the de-

fendants' motion to substitute counsel and upon the attorneys' motion that the Court fix their fee for services rendered. At that hearing evidence was taken and the defendant, Clarence A. Kolstad, in testifying under oath as to the services rendered by his original counsel, went out of his way to point out that his wife owned a portion of their farm in her own right and that she had purchased it with her own money. No suggestion was made on either of these occasions that the land was owned by any partnership.

Trial was commenced on December 12, 1956. Inasmuch as only part of the lands were taken, the before and after rule had to be applied in determining just compensation. When the trial commenced, defendants proceeded to establish the value of the entire 17,000 acres as a whole. In the course of his testimony the defendant Clarence A. Kolstad was asked the following questions and gave the following answers:

“Q. You might explain what the ownership of your wife is, and your own ownership with respect to this 17,000 odd acres shown in Exhibit 1.

“A. Well, in the beginning in 1942, when I first bought it, we bought two ranches, as I testified to. My wife bought what was known as the Sailer ranch, and I bought what was known as the Martin Wasesha ranch, so that she owns that in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy.

“Q. Well, substantially, without going into the exact details of it, then, your wife owns approximately half of the land and you own approximately half? A. That is close enough.

“Q. Some of it in joint tenancy and others individually owned by her and individually owned by you? A. Yes.

“Q. And while it is probably not important, but when you say that your wife bought one ranch, that was bought with her own money?

“A. Yes; it was.

“Q. It was actually her ranch? A. Yes.

“Q. It wasn't just a husband and wife deal where you had it deeded to her in her name?

“A. No.

“Q. Bought with her own money.”

No suggestion of partnership ownership was made by the witness. At this point the Court interrupted the trial and suggested that in view of the law, there being three separate and distinct ownerships involved, they could not be valued as a single ownership. After some discussion, defendants' counsel moved for a continuance upon the basis that he was not prepared at that time to try the case as three separate ownerships. The Court granted the continuance and also gave counsel for the defendants a week within which to present to the Court some authority to the effect that even though three ownerships were involved, they could be valued as one

because they had been operated as a unit. No authority to that effect was presented. Thereafter trial was resumed on January 17, 1957, and proceeded upon the theory of three separate ownerships. Judgment was entered for the amount which the jury fixed as just compensation and notice of appeal was filed.

Thereafter the defendants again changed counsel and this Rule 60(b) motion was presented. Now, for the first time is the suggestion made that the lands involved are owned by a partnership; this despite the repeated assertions throughout the course of this case by the defendant Clarence Kolstad to the effect that he owned part of the ranch, his wife owned part of the ranch, and they owned part of it jointly. The above quoted excerpt from the testimony of the defendant, Clarence Kolstad, is illustrative of his position throughout.

There is no question from the record in this case that all three ownerships were farmed together as a single operation, nor is there any question that the more land that can be brought into a wheat farming operation the more profitable the operation becomes. However, it is not the operation that is being valued, but the land, and the damage that arises from a taking of the land is to the owner of the land. Neither the counsel who tried the case for the defendants, nor their present counsel have presented the Court any authority holding that land held in different ownerships, but operated as a unit, may be considered as a whole for the purpose of

determining fair market value in a condemnation case, and the Court has been unable to find any such authority. All the authority which the Court has found is to the contrary. Thus in 18 Am. Juris., Eminent Domain, Section 271, page 912, the following rule is stated:

“Application of Principle to Lands of Different Owners—Tracts held by different titles vested in different persons cannot be considered as a whole where it is claimed that one is incidentally injured by the taking of the other for a public use. This is the rule although the owner of the tract taken holds an interest in the property claimed to be damaged, and although the two tracts are used as one.”

In *Glendenning v. Stahley*, 173 Ind. 674, 91 N.E. 234, where one tract was owned by a man and his wife as tenants by the entirety, and the other was owned by the husband alone, the Court said:

“It is settled that in determining the amount of special benefits or damages sustained by any one proprietor, all land belonging to him lying in a contiguous body, and used together for a common purpose, will be considered as one tract or farm, without regard to governmental subdivision. * * * This principal cannot be extended to cover lands owned by different proprietors, although contiguous and used under one management and for a common purpose.”

To the same effect is the holding in the case of *Duggan v. State*, 214 Iowa, 230, 242 N.W. 98, where one tract was owned by a sister and brother jointly, and the other tract was owned by the sister alone.

In *McIntyre v. Board of County Commissioners*, 211 Pac. (2d) 59 at page 63, the Kansas Court, in discussing the *Glendenning* and *Duggan* cases above referred to, made the following statement:

“It is true that in a great majority of the adjudicated cases the taking was from only one of the tracts used in conjunction with another tract or tracts owned by another but used together as one unit, while in the case before us we not only have a diversity of ownership of the two tracts used and operated as one farm unit, but we also have a taking from each tract in question. However, the same general principle must apply, that is, the pieces of land alleged to be a single tract must be owned by the same party and one owner is not entitled to recover compensation for land taken from him because of alleged damage resulting to that portion of his land remaining on account of the taking of land belonging to another even though, as under the facts of this case, the two tracts had been farmed and operated as one unit.”

In the *McIntyre* case the husband owned one 80-acre tract, his wife owned an adjoining 80-acre tract and both tracts were operated together as one farm unit.

The rule above announced by the Supreme Courts of the States of Indiana, Iowa and Kansas has also been recognized by the Court of Appeals for the Ninth Circuit in the case of *United States v. Honolulu Plantation Co.*, 182 Fed. (2d) 172 at page 175, where the Court said:

“It is a rule that, in condemnation of part of a tract owned in fee simple, just compensation is the market value of the tract as a whole, before condemnation, less the market value of the portion which remains after the taking of the part. The rule applies exclusively to condemnation of fee simple title of a tract in one ownership.”

See also Annotation in 6 ALR (2d) 1204.

An additional ground for the motion to set aside the judgment is alleged newly discovered evidence in connection with the testimony of one John Meissner. Mr. Meissner had operated the ranch of the defendants under lease on a share crop basis for several years and he testified as a witness on behalf of the government as to the production from said lands during the time he operated them. The claimed newly discovered evidence it is asserted will show that the production was more than testified to by Mr. Meissner. The short answer to this is that there is nothing newly discovered about such evidence. As a result of the pretrial conferences, the defendant Clarence Kolstad and his counsel were well aware that Mr. Meissner was going to be

called as a witness on behalf of the government, and as the landlord under a share crop lease arrangement, Mr. Kolstad had available to him all the knowledge as to production which his share crop tenant had, and should have presented his production figures at the trial if they were different than the production figures of Mr. Meissner.

The government also presented through Mr. Meissner evidence of a comparable sale of a ranch wherein Mr. Meissner was the purchaser. Defendants now claim to have "newly discovered" evidence that the transaction between Mr. Meissner and the vendor was not an arm's length transaction. Again, as a result of the pretrial conference, defendants were advised of the fact that Mr. Meissner would testify to the comparable sale. The seller to Mr. Meissner was available and could have been called by the defendants. Finally, counsel for the defendants did not see fit to even cross-examine Mr. Meissner at all with respect to the comparable sale.

For all of the foregoing reasons It Is Ordered that the motion to set aside the judgment be and the same hereby is denied.

Done and dated this 5th day of December, 1957.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and entered December 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Clarence A. Kolstad and Alta A. Kolstad, the Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order denying their Motion to set aside the Judgment made and entered in the above-entitled action on the 5th day of December, 1957.

Dated this 31st day of December, A.D. 1957.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,
Attorneys for Defendants-
Appellants.

[Endorsed]: Filed January 2, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which Defendants-Appellants, Clarence A. Kolstad and Alta A. Kolstad, will rely on appeal are:

1. The Court erred in ordering the trial to proceed on the theory of divided ownership of the land;
2. The Court erred in withdrawing the question of ownership of the land from the jury;

3. The Court erred in changing the theory of the case upon its own motion;

4. The Court erred in entering a deficiency judgment contrary to the evidence;

5. The Court erred in entering final judgment of condemnation contrary to the verdict and the evidence;

6. The Court erred in requiring evidence of value to be separated into three parcels;

7. The verdict is contrary to the evidence;

8. Irregularity in the proceedings of the court by which defendants-appellants were prevented from having a fair trial;

9. Accident and surprise which ordinary prudence could not have guarded against and the admission of the testimony of Joe Meissner;

10. Newly discovered evidence in connection with the testimony of Joe Meissner material to the defendants-appellants which they could not with reasonable diligence have discovered and produced at the trial;

11. The verdict is contrary to law.

Dated this 30th day of January, A.D. 1958.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,

Attorneys for Defendants-Appellants, Clarence A.
Kolstad and Alta A. Kolstad.

[Endorsed]: Filed February 3, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL
FROM MOTION

Defendants-Appellants, Clarence A. Kolstad and Alta A. Kolstad, herewith present the points on which they claim the court erred in denying their Motion to set aside the Judgment:

In denying Defendant-Appellants' Motion to set aside the Judgment.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,
Attorneys for Defendants-Appellants, Clarence A.
Kolstad and Alta A. Kolstad.

[Endorsed]: Filed February 3, 1958.

In the United States District Court, District of
Montana, Havre Division
No. 1726

UNITED STATES OF AMERICA,
Plaintiff,
vs.

11,211.45 Acres of Land, More or Less, in the Counties of Liberty and Toole, State of Montana;
CLARENCE A. KOLSTAD, et al.,
Defendants.

REPORTER'S TRANSCRIPT

The above cause came on regularly for trial before the Hon. W. D. Murray, United States District

Judge for the District of Montana, sitting with a jury, at Havre, Montana, on December 12, 1956, and was thereafter continued until January 17, 1957. The plaintiff was represented by its counsel, Mr. Krest Cyr, United States States Attorney for the District of Montana, Mr. Dale Galles and Mr. Michael J. O'Connell, Assistant United States Attorneys for the District of Montana, and the defendants Clarence A. Kolstad and Alta A. Kolstad were represented by their counsel, Messrs. R. G. Wiggenghorn and John M. Schiltz.

Thereupon, the following proceedings were had:

The Court: No. 1726, United States Versus Kolstad.

Mr. Galles: The government is ready.

Mr. Wiggenghorn: The defendants are ready.

The Court: Very well, call a jury.

Thereupon, the following named persons from the jury panel were called by the Clerk:

John L. King, Donald W. Powellson, Lucille Fisher, Bernice Lineweaver, Ben F. Underwood, Phil Yates, Lucille Nash, Donald D. Campbell, Kenneth Jackson, Richard Leighton, George Dielman, and Frank Goodian,

and were duly sworn to well and truly answer all questions put to them touching upon their qualifications to serve as trial jurors in the cause at issue.

Voir Dire Examination of the Jury

By the Court:

Q. Ladies and gentlemen of the jury panel, the case which we are going to commence to try this morning is another condemnation case in which the United States Government has taken for a public use lands of the defendant landowners under its power of eminent domain. This is a case in which the United States of America is the plaintiff, and the landowners here involved are Mr. and Mrs. Clarence Kolstad. Now, I will ask each of you a couple of questions individually just to get you located in the jury box to see who is who. Starting in the back row, are you Mrs. Fisher? A. Yes.

Q. Where do you live, Mrs. Fisher? [2*]

A. I live five miles south of Zurich.

Q. On a ranch? A. Yes, sir.

Q. What kind of ranch?

A. Partly irrigated, and my husband has a small dry farm not irrigated.

Q. How long have you lived there?

A. I have lived there for 30 years. I lived there with my relatives before my husband and I got the place.

Q. Do you have any knowledge or opinion of your own as to the value of lands generally in the area of the Tiber Dam Project?

A. I have none whatever.

Q. You are not acquainted with the lands in-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Examination of the Jury.)

involved, the lands involved being Mr. Kolstad's up by the Tiber Dam? A. No, sir, I am not.

Q. And the next gentleman, what is your name?

A. Phil Yates.

Q. Where do you live, sir? A. Havre.

Q. What is your occupation?

A. Vice President of the Citizens Bank.

Q. Do you own any farm or ranch lands?

A. No, I don't.

Q. Are you acquainted with the particular lands here involved [3] up under the Tiber Dam Project?

A. Not the particular lands.

Q. You have some knowledge of the lands generally up in that area? A. Yes.

Q. Do you have an opinion of your own as to the value of lands in that area?

A. I know something of the current values of farm land in that area, yes.

Q. As a result of your work in the bank, you deal in land values, do you?

A. We have some knowledge of them, yes.

Q. As a result of that, you have a fixed opinion as to the general value of lands in that area?

A. Yes.

Q. Is it such an opinion that it would take evidence to change your mind with reference to it? You are now satisfied as to the value of lands up there, are you, in your own mind?

A. That is in a very general way.

Q. Do you think your opinion is such that you would be able to sit as a juror in the trial of this

(Examination of the Jury.)

case, and decide the case, putting aside any opinions you may have, and that you could then decide the case upon the basis of the testimony and evidence presented in Court? [4]

A. I do.

Q. Any opinions that you have, you could put aside and out of your mind entirely for the purpose of trying this action? A. Yes.

Q. You would decide the case just upon the testimony and evidence presented in Court, and upon the instructions the Court gives you? You would accept my instructions as to how the question of just compensation in this case is to be fixed and determined, would you? A. I would.

Q. Do you know of any reason why, if selected to act as a juror in the trial of this case, you could not try the case fairly and impartially?

A. No.

Q. Do you know Mr. Kolstad?

A. Casually, yes.

Q. Do you have business dealings with him?

A. Not directly.

Q. Well, how about indirectly? What is the nature of your dealings with him?

A. Well, he is a customer of the bank. However, I have not handled any of his business dealings myself.

Q. You just know him to see him and to know who he is, is that correct? A. Correct. [5]

Q. You have no special activities together or anything of that nature? A. No.

(Examination of the Jury.)

Q. You don't know any reason then why you couldn't try the case fairly and impartially?

A. No.

Q. Are you acquainted with any of the counsel for Mr. Kolstad or the government?

A. No, I am not.

Q. And the third person?

A. Mrs. Lineweaver.

Q. Oh, yes, Mrs. Lineweaver. Where do you live, Mrs. Lineweaver?

A. Havre at the present.

Q. And you are married? A. Yes, sir.

Q. What does Mr. Lineweaver do?

A. We have the Northern Tire Company in Havre, and also farm north of Inverness.

Q. Now, do you have any fixed opinion as to the value of lands generally in the Tiber Dam area?

A. Well, being on that last case, I have had quite a lot of thought about it.

Q. You sat on a case in which you did fix the just compensation on particular land? [6]

A. Yes, sir.

Q. Well, would the fact that you sat on that case, do you think, bias or prejudice you in the trial of this case? A. No, sir.

Q. In other words, you decided that case just upon the evidence that was presented in Court and under the instructions of the court, and you followed the instructions of the court and arrived at a verdict? A. Yes, sir.

(Examination of the Jury.)

Q. Do you think, then, you could sit as a juror in this case and do the same thing?

A. Yes, sir.

Q. Decide the case just upon the evidence that is presented here?

A. Yes, sir.

Q. If you are chosen to act as a juror, you would do so?

A. Yes, sir.

Q. And the fourth person?

A. Mr. Underwood, Havre.

Q. Underwood. Where are you from, sir?

A. Havre.

Q. What is your occupation?

A. Life Insurance agent.

Q. Do you own any ranch or farm land?

A. No. [7]

Q. You are not engaged in that business at all?

A. No, I am not.

Q. Do you have any acquaintanceship with Mr. Kolstad?

A. I know Mr. Kolstad, yes.

Q. What is the nature of that?

A. Just casually.

Q. Just speak to him?

A. Yes, and I talk to him.

Q. You don't have any particular business dealings with him?

A. None at all.

Q. Are you acquainted with his land that is involved in this case?

A. No, I am not. I know approximately where it is.

Q. Do you have any fixed opinion, or any opin-

(Examination of the Jury.)

ion at all as to the value of lands up in the area of the Tiber Dam?

A. No, I don't believe I do.

Q. You think if you were chosen to act as a juror, you could sit in the case and try it fairly and impartially? A. Yes.

Q. Both as far as the government is concerned and Mr. Kolstad is concerned? A. Yes.

Q. Could you decide the case just upon the evidence presented in court and could you follow my instructions as to what the law is? [8]

A. Yes.

Q. Do you know of any reason why, if you are chosen to act as a juror, you couldn't try the case fairly and impartially? A. No, I don't.

Q. And the next gentleman is?

A. John L. King.

Q. Where do you live, Mr. King?

A. Havre.

Q. What is your occupation?

A. Switchman.

Q. Do you do any farming operation at all?

A. No, I don't.

Q. Do you own any farm or ranch land?

A. No, sir.

Q. You sat in the last case, too, I believe?

A. Yes.

Q. As a result of having sat on that case, do you have any fixed opinion as to the value of lands generally up in the Tiber Dam area?

A. No, I don't.

(Examination of the Jury.)

Q. It is just a question of proof in the particular case, then, as far as you are concerned?

A. Yes.

Q. In the case you sat on, you listened to the evidence and [9] the instructions of the court and arrived at a verdict?

A. Yes.

Q. Do you think you could do the same thing in this case?

A. Yes.

Q. You would have to wipe out of your mind the particulars of the other case as you sit in this case, and decide this case just upon the testimony presented in this case. Do you think you could do that?

A. Yes.

Q. You are not acquainted with Mr. Kolstad?

A. No.

Q. Or any of the counsel. Is there a reason of any kind that you know of why you couldn't sit on the case and try it fairly and impartially?

A. No, there isn't.

Q. Mr. Powellson, is it?

A. Yes.

Q. Where do you live?

A. Havre.

Q. What is your occupation?

A. Carpenter.

Q. Do you engage in any farming operations?

A. No, sir.

Q. Or own any farm or ranch land?

A. No. [10]

Q. Are you acquainted with Mr. Kolstad?

A. No, I am not.

Q. Or any of counsel in the case?

(Examination of the Jury.)

A. No.

Q. Are you acquainted with the particular lands involved of Mr. Kolstad's up under the Tiber Dam?

A. No.

Q. Do you have any opinion as to the value of lands in that area? A. No.

Q. If you are chosen to act as a juror, you could sit in the case and try it fairly and impartially as to both sides? A. Yes.

Q. Could you decide the case upon the testimony and evidence presented here in court and the instructions as I give them to you as to what the law is? A. Yes.

Q. Could you accept those instructions whether you agreed with them or not? A. Yes.

Q. There is no reason you know of why you couldn't sit in the case fairly and impartially?

A. No, sir.

Q. You are Mrs. Nash?

A. That's right. [11]

Q. Where do you live, Mrs. Nash?

A. I live a mile southwest of Chinook on a farm.

Q. Your husband operates a farm there?

A. Yes.

Q. As a result of that, do you have any fixed opinion as to the value of lands in the Tiber Dam area? A. No, I don't.

Q. Are you acquainted with the lands up there at all? A. No.

Q. You don't know the particular lands involved here? A. No.

(Examination of the Jury.)

Q. You don't know Mr. Kolstad? A. No.

Q. Or any of the counsel in the case?

A. No, I don't.

Q. If you are chosen to act as a juror in this case, do you think you would be able to try the case fairly and impartially as to both sides?

A. Yes.

Q. You would decide the case upon the testimony and evidence presented here in court? A. Yes.

Q. And you would follow my instructions as to what the law is whether you agreed with them or not, you would just accept them, would you? [12]

A. Yes.

Q. You don't know of any reason why you couldn't act fairly and impartially in the case?

A. No.

Q. Your name? A. Donald Campbell.

Q. Where do you live? A. Havre.

Q. What is your occupation? A. Barber.

Q. Do you engage in any farming or ranching operations? A. No, sir.

Q. Do you own any farm or ranch land?

A. No, sir.

Q. Do you know Mr. Kolstad?

A. No.

Q. Or counsel in the case? A. No.

Q. Do you have any opinion as to the value of lands in the Tiber Dam area?

A. Very slight opinion, just talk.

Q. Just a passing opinion. It is not such an opinion that is fixed in your mind? A. No.

(Examination of the Jury.)

Q. Whatever kind of opinion you have, is it such that you [13] would be able to put it out of your mind entirely for the purpose of sitting on this case? A. Yes.

Q. You could sit in this case and decide the issue involved here, which is just compensation, just upon the testimony and evidence that is presented in this case? A. Yes, sir.

Q. And the law as I give it to you? Could you follow my instructions as to the law?

A. Yes, sir.

Q. Do you know any reason why you couldn't sit on the case and try it fairly and impartially?

A. No, sir.

Q. Your name sir? A. Kenneth Jackson.

Q. Where do you live?

A. North of Hingham.

Q. And you are engaged in farming?

A. Farming.

Q. What kind of farming?

A. Grain and cattle.

Q. Are you acquainted with the lands in the Tiber Dam area?

A. No. I know where it is.

Q. You don't know the particular lands here involved owned by Mr. Kolstad? [14]

A. No.

Q. Do you know Mr. Kolstad? A. No.

Q. Or any of counsel in the case? A. No.

Q. Well as a result of your own operations, you,

(Examination of the Jury.)

of course, have some opinion as to land values of your own land and in your neighborhood, I suppose?

A. Yes.

Q. Well, is that opinion such that you could put it aside as far as the trial of this case is concerned?

A. Yes.

Q. We are not interested, of course—the matter is not determined upon what any juror's opinion is as to other values, or what the values ought to be, anything of that nature. We will decide the case upon the testimony and evidence presented in court and under the instructions I give you as to what the law is. You take those instructions and follow them to the letter and you then decide what the facts are under the testimony and evidence, and you think you could do that in this case?

A. Yes, sir.

Q. Fairly and impartially? A. Yes, sir.

Q. Both to Mr. Kolstad and to the [15] government? A. Yes, sir.

Q. Do you know of any reason at all why, if you are chosen to act as a juror, you can't try the case fairly and impartially?

A. No, I don't.

Q. Mr. Leighton? A. Leighton.

Q. Where do you live, Mr. Leighton?

A. Chester.

Q. You work for the county as I recall it, is that right? A. Yes.

Q. You don't engage in any farming operations yourself? A. No, I don't.

(Examination of the Jury.)

Q. Or own any farm land? A. No.

Q. You, of course, are acquainted with the general area of the lands under the Tiber Dam?

A. Yes.

Q. Are you familiar with the lands here involved? A. I know of the lands.

Q. You don't have any special knowledge of those lands?

A. I have been over those lands.

Q. How did you happen to go over them?

A. Oh, in my hunting trips and fishing trips.

Q. I see, so you just have a general acquaintance with the [16] land, you never worked on the land or inspected it or appraised it? A. No.

Q. Well, you also sat on the trial of the previous case? A. Yes.

Q. Which involved lands under the Tiber Dam?

A. Yes.

Q. As a result of that, do you now have any fixed opinion as to the value of lands up there generally?

A. Just some idea of the surrounding territory.

Q. Well, you did fix, of course, in the other case the value of the particular lands there involved, what just compensation the owner was entitled to, but could you put that and the evidence in the other case out of your mind? A. Yes.

Q. If you are chosen to act as a juror in this case? A. I could.

Q. And decide the question of just compensation in this case just upon the testimony and evi-

(Examination of the Jury.)

dence presented here in court? A. I could.

Q. Under my instructions as to what the law is?

A. Yes.

Q. You don't, then, have any opinion that would bias or prejudice you in any way? [17]

A. No.

Q. Mr. Dielman, where do you live, sir?

A. Box Elder.

Q. What is your occupation?

A. Farming.

Q. What kind of a farm?

A. Wheat and some cattle.

Q. You also sat in the last case?

A. Yes, sir.

Q. Let me ask you first, do you know Mr. Clarence Kolstad? A. I don't know him.

Q. Or any of counsel, except as you saw them in the courtroom? A. That is all.

Q. Well, as a result of your sitting in the other case, do you have any opinion as to the value of lands generally under the Tiber Dam project?

A. Not any more than what we heard in the last case.

Q. Well, of course, you understand that was for your consideration in the determination of that case, and you do, as a result of that case, and the evidence in that case, have an opinion as to the value of lands generally up there? A. Some.

Q. Is that such that you could put it out of your mind?

(Examination of the Jury.)

A. No, I don't think it is, I think I could pass a fair verdict. [18]

Q. In other words, you think you could put aside the evidence and testimony in the last case, put it out of your mind and just decide this case upon the testimony and evidence presented here?

A. Yes, sir.

Q. The testimony may be entirely different, you see, and if it is, can you put that other testimony out of your mind so that you can just judge and weigh the testimony in this case? A. Yes.

Q. You think you could do that? A. Yes.

Q. And if you are chosen to act as a juror, the fact you do have some opinion as a result of sitting in the other case, that wouldn't bias or prejudice you in this case so far as Mr. Kolstad is concerned?

A. No.

Q. Or so far as the government is concerned either? A. No.

Q. You think you could approach the thing fairly and impartially and decide the thing just on the evidence in this case and my instructions as to what the law is? A. I do.

Q. Mr. Goodian, is it? A. Yes, sir. [19]

Q. Where do you live, sir? A. Box Elder.

Q. What is your occupation?

A. Wheat farming.

Q. You also sat in the last case, as I recall?

A. Yes, sir.

Q. You are not acquainted with Mr. Kolstad?

A. No, sir.

(Examination of the Jury.)

Q. Or counsel? Do you have any knowledge of the particular lands here involved owned by Mr. Kolstad? A. Just from the last case.

Q. These lands weren't involved in the last case. You did sit in the last case and return a verdict with reference to just compensation. As a result of that, do you have any fixed opinion as to what the value of lands generally are in the Tiber Dam area? A. No, sir.

Q. You were just concerned with fixing the particular values in that case? A. Yes, sir.

Q. Whatever knowledge you have in your mind as a result of having sat in that case, you can put aside, can you, as far as sitting as a juror in this case is concerned? A. Yes, sir.

Q. You would decide this case just upon the evidence presented [20] here in this case?

A. Yes, sir.

Q. And decide it under my instructions as to what the law is? A. Yes, sir.

Q. Do you know any reason why you couldn't act as a fair and impartial juror? A. No, sir.

Q. Treating Mr. Kolstad fairly and treating the government fairly, and decide the case between them as between equals. I might ask you all and say this to you: It may appear from the evidence that the defendant here is a very large operator, and the lands involved are quite extensive. In sitting as jurors in the trial of the case, would that fact bias or prejudice you in anyway?

(No audible response.)

(Examination of the Jury.)

Q. Do any of you think that the fact that Mr. Kolstad, the owner here, may be a very prosperous and large operator, would that bias or prejudice you in anyway in sitting in the case?

(No audible response.)

Q. You think you could treat him just as fairly as you could treat a small operator?

(No audible response.)

Q. Everyone must be treated equally. You understand that [21] and would you do that?

The Jurors: Yes.

The Court: Are there any particular questions?

Mr. Schiltz: We have none, your Honor.

Mr. Galles: No.

The Court: Very well, the defendant's, or the government's first peremptory challenge.

(Government's First Peremptory Challenge:
Phil Yates.)

The Clerk: R. V. Umstead.

R. V. UMSTEAD

sworn.

Examination

By the Court:

Q. Where do you live, Mr. Umstead?

A. Chinook.

Q. What is your occupation?

A. I have a lumber yard; I also have a farm.

(Examination of the Jury.)

Q. What kind of a farm?

A. An irrigated farm.

Q. Are you acquainted with the lands generally under the Tiber Dam project?

A. No. I have been up there fishing. I have seen some of it.

Q. As a result of operating a farm yourself, you have an opinion, of course, as to the value of that farm, I suppose?

A. Yes, but it is a different kind of farm.

Q. A different kind of farm?

A. Yes. [22]

Q. You don't then have any opinion as to the value of farm or ranch land under the Tiber Dam project?

A. No, sir.

Q. You don't have any knowledge of that at all, and you have no opinion?

A. No, sir.

Q. Then, you think if you are chosen to act as a juror in the trial of this case, you could try the case fairly and impartially both as to Mr. Kolstad and the government?

A. Yes.

Q. Could you decide the issue here, which is just compensation, what Mr. Kolstad is entitled to, just upon the testimony and evidence that is presented here in court?

A. Yes.

Q. And under the instructions I give you as to the law?

A. Yes.

Q. You would follow those instructions, would you?

A. Yes.

Q. To the letter?

A. Yes, sir.

Q. I might ask you also that if it appears from

(Examination of the Jury.)

the evidence, as it may very well, that Mr. Kolstad is himself a prosperous, large operator, and that the lands here involved are quite extensive, would those facts bias or prejudice you in determining the value of the lands taken? [23]

A. No, sir.

Q. You would be able to treat him just as you would any other person who came before the court and jury in a case of this kind?

A. Yes, sir.

Q. Fairly and impartially, granting to him all that he is entitled to, whether he be rich or poor?

A. Yes, sir.

Q. There is no reason at all, then, that you know of, why you couldn't sit in the case and try it fairly and impartially?

A. No, sir.

The Court: Anything further?

Mr. Galles: Nothing further.

Mr. Schiltz: Nothing further.

The Court: Step down, please, take a seat along the rail. The defendants' first peremptory challenge.

(Defendants' First Peremptory Challenge:
Donald W. Powellson.)

The Clerk: John Rocks.

JOHN ROCKS

sworn.

Examination

By The Court:

Q. Mr. Rocks, where do you live?

A. Joplin.

(Examination of the Jury.)

Q. What is your occupation?

A. Well, I am a farm laborer.

Q. Do you own any farm land up there? [24]

A. Not now.

Q. You used to in years past?

A. I did. I sold my place three years ago.

Q. As a result of your experience and having owned land and working around farm and ranch properties, do you have a fixed opinion as to the value of lands up in that area? A. No.

Q. You don't. You had a fixed opinion, I suppose, of the value of your own property, but you don't have any opinion, you say, as to the value of lands generally under the Tiber Dam project?

A. Not particularly.

Q. Are you acquainted with those lands?

A. I am.

Q. Just how extensive is your acquaintance?

A. Just going across and so on.

Q. You have been through there?

A. Lots of times.

Q. You have seen generally what kind of land it is? A. Yes.

Q. Do you know anything about the particular lands here involved owned by Mr. Kolstad?

A. No, I don't—just to a certain extent I do.

Q. You know just where they are, generally?

A. That's right. [25]

Q. You don't have any idea, then, as to their value? A. Not particularly, no.

Q. You have no opinion with reference to it?

(Examination of the Jury.)

A. No, I haven't.

Q. Do you think that you could—that is the question we are going to have to determine in this case, the government having taken some land from Mr. Kolstad, we are going to have to determine what he is entitled to, what is just compensation to him to make him whole, so that when this case is over, as a result of the government having taken his land, he will be neither richer nor poorer; the jury is going to have to give him enough money in damages so he will be neither richer nor poorer as a result of this taking, so we are concerned with the values up there. Do you think you could sit in this case and try it fairly and impartially so far as Mr. Kolstad is concerned?

A. Yes, sir.

Q. And so far as the government is concerned?

A. Yes, sir.

Q. Would you decide the case just upon the testimony and evidence presented here in court?

A. Yes, sir.

Q. And not upon any ideas of your own as to what lands are or ought to be worth up in that country. Do you know any reason at all why you couldn't try the case fairly and impartially? [26]

A. No.

Q. Would the fact that Mr. Kolstad may be a prosperous large operator and the lands here involved are quite extensive, would that bias or prejudice you in anyway?

A. No.

Q. You believe, just as the law does, that he is entitled to fair treatment whether he is rich or poor?

(Examination of the Jury.)

A. That's right.

The Court: Anything further?

Mr. Galles: No, your Honor.

The Court: The government's second peremptory challenge.

(Government's Second Peremptory Challenge: Ben F. Underwood.)

The Clerk: Earl F. Keith.

EARL F. KEITH

sworn.

Examination

By the Court:

Q. Mr. Keith, where are you from?

A. Chester.

Q. What is your occupation? A. Farmer.

Q. What kind of farming do you engage in?

A. Wheat farming.

Q. And, of course, you are acquainted with the lands generally up under the Tiber Dam project?

A. Yes. [27]

Q. Do you have an opinion as to the value of lands up there? A. My own land, yes.

Q. Do you have any opinion as to the lands generally under the Tiber dam, in that area?

A. Generally.

Q. Generally you have an opinion as to the value of lands. Are you acquainted with the particular lands here involved?

A. I know their whereabouts.

(Examination of the Jury.)

Q. You don't know the lands specifically, you don't know the type of soil, or what they produce, or anything of that nature, you have no particular information about it? A. No.

Q. Is the knowledge that you have and the opinion you have with reference to values such that it would influence you in deciding the issue in this case? A. No.

Q. You don't think so? A. No.

Q. You think you could put that, whatever it is, out of your mind, that opinion, and decide this case and then form an opinion in this case based just upon the testimony and evidence that is presented in court? A. I do.

Q. Let me ask you, do you know Mr. Kolstad?

A. Yes. [28]

Q. You are acquainted with him?

A. I know him, yes.

Q. Just know who he is? A. Yes.

Q. You don't have any business dealings with him? A. No.

Q. Or you have no real close social association with him, visiting at his home, or anything of that nature? A. No.

Q. Nothing in that acquaintanceship that would bias or prejudice you in sitting as a juror?

A. No.

Q. Do you know any reason why at all you couldn't sit in the case and try it fairly and impartially? A. No.

(Examination of the Jury.)

Q. Would the fact that Mr. Kolstad may be a large operator, and that the lands here involved are quite extensive, would that bias or prejudice you in anyway? A. No.

Q. And do you think you could try the case fairly and impartially as to both parties?

A. I do.

The Court: Very well, anything further.

Mr. Galles: Nothing, your Honor.

The Court: Very well, you may step down. The defendants' [29] second peremptory challenge.

(Defendants' Second Peremptory Challenge:
Donald D. Campbell.)

The Clerk: John Schilling.

JOHN SCHILLING

sworn.

Examination

By the Court:

Q. Mr. Schilling, where do you live?

A. Chinook.

Q. What is your occupation? A. Laborer.

Q. Do you own or operate any farm land?

A. No, I work for the county.

Q. You also sat in the trial of the last case as a juror? A. Yes.

Q. Do you have any opinion generally as to the value of land in the Tiber Dam area?

A. No, just——

(Examination of the Jury.)

Q. Just as a result of sitting on the trial of the last case? A. Yes.

Q. That, of course, was directed specifically to the determination of the just compensation in that case, although there was some evidence generally as to other values up in that area. Now, for the purpose of deciding that same issue in this case involving different lands, could you put out of your mind any opinion you may have formed as a result of [30] having sat in the last case?

A. Yes.

Q. You think you could sit in this case, then, fairly and impartially? A. Yes.

Q. And try the case fairly so far as Mr. Kolstad is concerned and so far as the Government is concerned, you think you could do that?

A. Yes.

Q. Would the fact that Mr. Kolstad may appear to be a large and extensive operator and the lands here involved are quite extensive, would that bias or prejudice you in anyway? A. No.

Q. You think he is entitled to, whether he be large or small, entitled to the same consideration at the hands of the court and jury as anyone else?

A. Yes.

Q. Do you know any reason at all why you couldn't sit on the case and try it fairly and impartially? A. No.

The Court: Very well, you may step down. The government's third and last peremptory challenge.

(Examination of the Jury.)

(Government's third and last peremptory challenge: Earl F. Keith.)

The Clerk: Wesley C. Maddox. [31]

WESLEY C. MADDOX

sworn.

Examination

By the Court:

Q. What is your name, sir?

A. Wesley Maddox.

Q. Where do you live?

A. Three miles east of Chinook.

Q. And you are engaged in farming and ranching?

A. That's right, I am in partnership with my father.

Q. What kind of an operation is it?

A. It is irrigated hay and pasture with a small dry land farm on the side.

Q. Are you acquainted with the lands under the Tiber Dam project? A. No, sir.

Q. You don't know the particular lands here involved belonging to Mr. Kolstad?

A. No, sir.

Q. Do you know Mr. Kolstad?

A. No, I don't, sir.

Q. You don't have any opinion as to the value of lands in the Tiber Dam project?

A. Only that of Henry Kolstad.

Q. You sat on the trial of the last case?

(Examination of the Jury.)

A. That's right.

Q. As a result of that, you fixed just compensation for Mr. Henry Kolstad in that case? [32]

A. That's right.

Q. As a result of sitting in that case, and the testimony and evidence presented to you, you naturally came to some opinion with reference to values up there, and there was some testimony with reference to other values in the area. There was no particular reference to the lands involved here, however, in that case, the Clarence Kolstad lands. Now, can you, for the purpose of deciding the same question that was before you in the other case, put out of your mind all of the testimony and evidence and any opinion you may have arrived at in that case?

A. Yes, sir.

Q. You could try this case just as fairly and impartially as you sat and tried the other case?

A. I could.

Q. You would decide the issue in this case just upon the testimony and evidence that is presented in this case?

A. Yes.

Q. Not what was presented in any other case?

A. No.

Q. You think if you are chosen to act as a juror then, you could try the case fairly and impartially?

A. I could .

Q. The fact that he may be an extensive and large operator wouldn't bias or prejudice you in anyway? [33]

A. No, sir.

(Examination of the Jury.)

The Court: You may step down. The defendant's third and last peremptory challenge.

Mr. Wiggernhorn: Could we have a minute?

The Court: Yes.

(Defendants' third and last peremptory challenge: John Schilling.)

The Clerk: Ralph M. Black.

RALPH M. BLACK

sworn.

Examination

By the Court:

Q. Sit down, Mr. Black. Where do you live?

A. Well, just at the outskirts of the city limits in Chinook.

Q. What is your occupation?

A. I am an oil and gas well driller.

Q. Do you own any farm or ranch land?

A. No, sir.

Q. Have you engaged in any farming or ranching operations? A. No, sir.

Q. You sat on the trial of the last case we just finished trying? A. Yes, sir.

Q. Do you have any opinion as to the value of lands in the Tiber Dam area?

A. No, just from the evidence in the other case.

Q. Just as you sat in the trial of the other case and fixed [34] just compensation for Mr. Henry Kolstad in that case? A. Yes, sir.

Q. There was some evidence with reference to

(Examination of the Jury.)

the value of land around there, but there was no reference to this land involved in this case?

A. No.

Q. Whatever opinion you may have, could you put that out of your mind if you are chosen to act as a juror in this case and decide this case just as you decided the first case, and make your decision just upon the testimony and evidence that is presented in this case?

A. Yes, sir.

Q. And follow my instructions, of course, as to what the law is?

A. Yes, sir.

Q. And you don't think that Mr. Clarence Kolstad here would be prejudiced and biased in anyway by having you sit as a juror because of your experience sitting in the other case as a juror? Both Mr. Kolstad and the government would get a fair and impartial verdict from you?

A. Yes, sir.

Q. Would the fact that Mr. Kolstad is a large and extensive operator bias or prejudice you in any way?

A. No.

Q. He is entitled to fair treatment? [35]

A. Yes.

Q. He is entitled to just compensation?

A. Yes, sir.

The Court: Very well. Anything further to ask this juror?

Mr. Schiltz: Nothing.

The Court: Very well, you may step down, sir. The Clerk will call the names of the persons chosen to act as jurors. If you are sitting in the box and your name is not called, kindly step out of the box,

and those whose names are called will take a seat in the box.

The Clerk: John L. King, John Rocks, Lucille Fisher, Bernice Lineweaver, Wesley C. Maddox, R. V. Umstead, Lucille Nash, Ralph Black, Kenneth Jackson, Richard Leighton, George Dielman, Frank Goodian.

The Court: Very well, you may swear the jury.

(Jury sworn.)

The Court: Very well, ladies and gentlemen of the jury panel, those of you not engaged in the trial of this case will be excused from further attendance upon the court until Saturday morning at ten o'clock. Be back at that time.

Now, I might tell the witnesses and spectators, as you have noticed in the trial of the case preceding, that I continually during the course of the trial instructed the jury not to discuss with each other or anyone else, nor permit itself to be addressed by anyone concerning any of the issues [36] of the case. Now, because our quarters are close up here, I am going to instruct witnesses and spectators and everybody else around that they likewise are not to discuss this case or any of the issues of it or any witnesses, or express any opinions with reference to it in this courthouse. The jurors are out in the hall during recesses to relax for a few minutes, for a cigarette, or do whatever else they want, and they are entitled not to overhear discussions of other people with reference to what they think about the case, and so, if you, or any of you, are reported to

me to have discussed the matter in the hallway in the presence of the jury or a juror, you will be held in contempt of court.

Mr. Galles: Your Honor, witnesses may consult with counsel in the courthouse, of course?

The Court: Yes, they may consult with counsel, but I don't want them in the hallways talking and expressing opinions with reference to anything that goes on in the courtroom. The jury is entitled to that kind of protection, and I am going to give it to them. If it is reported to me that witnesses are talking among themselves in the hallways, or spectators are mentioning anything about the case, they will be brought before me and suffer accordingly.

(Jury admonished; 10-minute recess.)

The Court: You may open for the landowner.

Mr. Schiltz: May it please the court, counsel, ladies [37] and gentlemen of the jury——

The Court: Pardon me, just a minute. Is there a draft here on you? Do you want this door open? Are you all comfortable? Very well.

Mr. Schiltz: I am Jack Schiltz. I am a lawyer in Billings. This is my partner, Ralph Wiggenhorn; next to him is Mr. Kolstad, the defendant in this case; and Mr. Galles, the United States Attorney, and next to him, Mr. O'Connell.

It is my job at this time to explain to you in outline form just what our theory of this case is. First of all, we would like to show you that there has been something of a revolution in agricultural practices in the Triangle Area, which, of course, in-

cludes the area that we are going to be talking about in this case. I might say parenthetically that I have not always lived in the Billings area. I was born 20 miles down the road here at Kremlin where my father owned and ran a lumber yard. I have heard since we left the country in 1923 when he locked the doors, that part, at least, of the reason was that in those days it just wasn't agriculturally economical to operate on a 320-acre homestead. Now, that ties into what has happened here. Since those days, we expect to show you that people like Clarence Kolstad have learned that you can operate with large amounts of machinery, large acreages and get large yields. We want to show you that in the course of this case, and we want to show you it [38] isn't peculiar to Clarence Kolstad, the defendant here, it is a thing peculiar to the whole Triangle Area. We expect to show you, also, that Mr. Kolstad and his wife, who is also a defendant in this case, started accumulating land in about 1929 or 1930, started with a very small tract of land, some four or five hundred acres, and by dint of having superior lands and ability in operating the lands, they have expanded their holdings until now they have something like 17,000 acres in round figures. He has operated that land, as I have indicated, with large amounts of machinery because it was economical to operate a farm that way, not for just himself, but for anybody who could accumulate that much land and did accumulate that much land, it was possible to operate in such a way that the custom saved him

money, and, of course, got a larger yield from the property. Since the Tiber Dam condemnation has come along, Mr. Kolstad has been reduced to about half of his original holdings, and now has about 8,000 acres, which is divided up into three separate tracts. We will attempt to show you those are less economical than it was originally, and, of course, we will claim that is an element of damage in this case——

The Court: Just a minute, counsel, let me suggest to you that that in itself will not be an element of damage, only as that may be reflected in the market value.

Mr. Schiltz: I am sorry, your Honor. We believe that [39] you as jurors are entitled to know everything there is to know about the Kolstad property. If some of those things happen to be and appear to be and maybe are to the detriment of Mr. Kolstad, we will show you those, too. We think that you as jurors are entitled to form your opinion of the fair market value of Mr. Kolstad's property before and after the taking for the Tiber Dam on the basis of everything a buyer from Mr. Kolstad would have at his command, all the information that he would develop. We will show you Mr. Kolstad's books, or an analysis of those books, how many acres he farmed, how many bushels he produced, and we will show you everything it will be possible to know, except the labor and the sweat and the heartache that goes into 25 years of putting together an operation such as this is, and

we will support those figures with the testimony of a certified public accountant who has examined the books and income tax returns. Finally, we will produce an expert appraiser who has come in here and appraised Mr. Kolstad's land. We have searched the entire northwest to find an appraiser that we think is big enough and capable enough to appraise 17,000 acres such as these lands, and we think we found the best man as we think we will show you. Finally, I would like to say that when any expert, either on our side or the other side, gives an opinion, I would like that you listen to his opinion, as, of course, you will, but also that you consider the reasons that [40] he has supporting that opinion. Thank you.

The Court: Does the government wish to make a statement at this point or reserve it?

Mr. Galles: Reserve our opening statement.

The Court: Very well, you may call the first witness.

CLARENCE A. KOLSTAD

one of the defendants, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wiggenhorn:

Q. Will you state your name?

A. Clarence A. Kolstad.

Q. How old are you? A. 50.

Q. And where do you live?

(Testimony of Clarence A. Kolstad.)

A. Chester, Montana.

Q. And you are a farmer? A. Yes.

Q. You are one of the defendants in this case, are you? A. I am.

Q. And your wife is the other defendant?

A. Yes, sir.

Q. And you and your wife own lands that were taken and are here in contemplation or controversy in this case? [41] A. Yes, we do.

Q. When did you first come into that Chester area, Mr. Kolstad?

A. When I was five years old.

Q. Was your father a farmer before you?

A. Yes, he was. He homesteaded in 1910 or 1912.

Q. Was his homestead likewise in the Chester area? A. Yes.

Q. So you virtually spent your entire lifetime in that particular vicinity out there on a farm?

A. Yes, I have.

Q. I take it you profess to know something about farming and are an experienced farmer?

A. I think I do.

Q. Besides your wife, do you have a family?

A. Yes, three boys.

Q. Will you tell us about your family, what they consist of?

A. One boy is 24 years old, one is 21, and one is 12.

Q. You don't have any daughters?

A. No, I'm sorry about it.

(Testimony of Clarence A. Kolstad.)

Q. And those boys, they all live and work with you on the farm, do they?

A. Well, the two older boys do, the other little fellow is too small to work, but he spends some time there. [42]

Q. Where were you born, by the way, Mr. Kolstad? A. Larimore, North Dakota.

Q. Now, you said you had been a farmer all of your life, was that farming of yours interrupted at any time during your life?

A. Yes, I spent about five years in the Sheriff's office at Liberty County and Chester as Under Sheriff from 1930 through 1934.

Q. That would be——

A. About five years.

Q. How old were you during that period of time? A. Oh, about—between 24 and 29.

Q. Did you own any farm before you went into the Sheriff's office?

A. Yes, I was farming before I went in.

Q. How much of a farm did you have in acres?

A. We probably farmed two thousand acres. I probably owned about five or six hundred.

Q. You said, "We probably farmed," who are we?

A. I was operating in partnership with my brother.

Q. Your brother is which one, what Kolstad?

A. Henry B. Kolstad.

Q. Your older brother? A. Yes.

Mr. Galles: If I may interrupt, there are some

(Testimony of Clarence A. Kolstad.)

of the [43] other defendants that were named in this action, and I believe that we did not call out to see if any of them were here being interested in the case. I overlooked that, and I apologize.

The Court: Well, isn't this—this is separated from the others, the remaining portion of the case is continued until Saturday morning at 10 o'clock, is it not?

Mr. Galles: Well, for title purposes, there were others named in these two parcels, some who might possibly claim an interest——

The Court: Only the parcels with reference to Mr. Kolstad?

Mr. Galles: Yes.

The Court: You may inquire, who are they?

Mr. Galles: Amerada Petroleum Corporation; Robert C. Balsam and Mary F. Balsam, his wife; Frank H. Wasson and Blank Wasson, his wife, if any; G. A. Thiel and Blank Thiel, his wife, if any; and Lila Jane MacGowan, on Parcel Ten. On Parcel Eleven, Amerada Petroleum Corporation; Nick Laas, Executor of the estate of Martin Wasesha, deceased; Thomas F. Wallace and Blank Wallace, his wife, if any; and Wells-Dickey Company, a corporation.

The Court: Are any of those persons present, or anyone else claiming any interest in the lands here involved?

Mr. Galles: I move default be entered. I will supply a written motion and order, as well as an affidavit. [44]

(Testimony of Clarence A. Kolstad.)

The Court: Very well.

Mr. Wiggernhorn: Your Honor, so this matter will be clear to the jury in the case, it is understood, is it not, so far as this trial is concerned, it concerns only these two defendants mentioned?

The Court: Yes, I suppose that the land is owned jointly by the two, is that it?

Mr. Wiggernhorn: Well, I'll bring it out in the testimony.

The Court: Yes.

Q. (By Mr. Wiggernhorn): Now, when you went into the Sheriff's office, were you and your brother operating these lands of which I think you said you owned about five hundred acres in sort of a partnership? A. Yes.

Q. And did that continue when you were in the Sheriff's office, or what was the arrangement with respect to your own land?

A. I leased it to him.

Q. And during the five years that you were in the Sheriff's office, did you acquire other lands?

A. Yes, I was buying land all the time.

Q. I neglected to ask you with respect to the five hundred acres you owned when you first went into the Sheriff's office, is that a part of the land here in controversy? [45] A. No.

Q. It is no longer owned by you then?

A. No.

Q. Now, you said you acquired about how many acres during the time you were in the Sheriff's office?

(Testimony of Clarence A. Kolstad.)

A. Well, I presume twelve or fifteen hundred acres.

Q. And is that some of the land that is here in controversy? A. No.

Q. Again that is not the land. Now, you quit the Sheriff's office in what year?

A. In the spring of 1935.

Q. Well, now you might tell us how you or your wife, either one or both of you, acquired the lands here in controversy, and piece by piece as you did acquire them.

A. Well, along about—this place that you have been talking about—

Q. I want to know just what place that is.

A. That's what we call the East place.

Q. I know, but you say this place I have been talking about, I don't remember what I am talking about.

A. The place you have been asking me questions about.

Q. Are you referring now to the place in controversy here? A. No, I'm not. [46]

Q. Well, let's be sure we both understand each other. You might identify it, if you will, please.

A. Well, we call it the East place, this other place. We lived there until about 1942. That is when I first acquired any land that's in controversy.

Q. It is my error, Mr. Kolstad, I have straightened myself out, probably more than you. You are referring, are you not, to 3200, or approximately,

(Testimony of Clarence A. Kolstad.)

acres that is now held, as far as title is concerned, by your three sons, is that right?

A. That's right.

Q. Well, let's go back a moment again, the five hundred acres that you owned at the time you went into the Sheriff's office, is that a part of that 3200 acres?

A. Yes, it is.

Q. And the 1500, or thereabouts, which you acquired while in the office, is that also a part of the 3200 acres not in controversy here?

A. That's right.

Q. And so the jury may understand the facts with respect to that what I have referred to as 3200 acres, that is the tract that belonged to you and your wife also, did it?

A. Yes.

Q. When did you part with title?

A. 1948.

Q. And to whom did you convey it then? [47]

A. To the three boys.

Q. So, it is still in the family, so to speak?

A. Yes.

Q. But, it is not a part of the 17,000 acres we are going to talk about in a minute?

A. No, it isn't.

Q. Does it lie in close proximity to it?

A. It's about four and a half miles apart.

Q. And you might tell us in passing, do you also operate that at the present time in connection with the other 17,000 acres here in controversy?

A. Yes, we have been operating it all as one unit.

(Testimony of Clarence A. Kolstad.)

Q. But it is not part of these lands that are involved here? A. No.

Q. I might add one thing more about that 3200 acres, while it is owned by your sons, do you have anything to do with the operation of it?

A. I manage it, yes.

Q. You spoke of one of your sons being 24 years of age, is he actually on the place, or what is he doing now?

A. In the summer time he is, but he goes to college.

Q. Where does he go to college?

A. Bozeman.

Q. And what is the year in college now? [48]

A. He has one year left.

Q. He has one year left. He is in the third year in college? A. Yes.

Q. Is he attending the Agricultural College there? A. Yes.

Q. And preparing himself for farming, is that the idea? A. That's the way he feels now.

Q. By the way, he is going to be married in a few days, isn't he? A. Yes, he is.

The Court: Are we going to finish the case in time for the wedding?

The Witness: If we don't, we will have to shut the case down.

Mr. Wiggernhorn: I might say, the boy is considerably worried about it. The twenty-one year old son is not married? A. No, he isn't.

Q. No prospects at the moment, are there?

(Testimony of Clarence A. Kolstad.)

A. No.

Q. Well now, let's continue and get back to the 17,000 acres, and by the way, I have called it 17,000 acres, how many acres did you own of which part was taken?

A. Seventeen thousand and about four hundred. [49]

Q. They are all contiguous, are they not?

A. Yes.

Q. I think I was asking you how, as to times—you didn't acquire that all in one tract, did you?

A. No.

Q. How did you piece it together, would you just give us briefly the pieces as you bought them, one after another?

A. Well, in 1942, the early part of 1942, we bought what is known as two old time ranches, one is the Sailor and the other was the Wasesha Ranch.

Q. How many acres, did you say?

A. Well, between the two, approximately 8,500 to 9,000 acres.

Q. Now, at that time, you and your wife owned the 3,200 acres that you spoke of?

A. Oh, yes, yes.

Q. A separate unit, and you were farming it?

A. Yes.

Q. Were you farming it successfully at that time? A. Well—

Q. Did you have any income excepting from that place with which you could buy this acreage?

A. No, it came from the farm income.

(Testimony of Clarence A. Kolstad.)

Q. Then go ahead, what did you acquire after that?

A. Well, we acquired little 160 and 320-acre tracts, as I went along, I can't recall—— [50]

Q. Individual ones?

A. Individual ones, and then in 1945, fall of 1945 we bought what was known as the Turner Ranch, which was directly west of the property we already had, and joined it.

Q. And joined it?

A. Yes, and that consisted of about, oh, I think between six and seven thousand acres.

Mr. Wiggernhorn: Can you all hear the witness as he is talking? Any difficulty about it?

Q. Be sure to speak up loud enough, Mr. Kolstad. How many acres again?

A. Between six and seven thousand.

Q. And was there any more acquired after that?

A. Well, just small tracts. Maybe a half section or a quarter.

Q. And that went over a period of years, did it? About when was it you got your last piece of land out of this total of 17,400 acres?

A. Oh, I think probably three or four years ago.

Q. So it has been a process through the years, as you picked up a piece here and there, sometimes small pieces and sometimes larger ones, until you finally, about three or four years ago, had an entire unit together, which you have described to us?

A. Yes. [51]

Q. Now, have you had prepared, Mr. Kolstad, a,

(Testimony of Clarence A. Kolstad.)

let us call it a map of this entire ranch so that the jury may see how it lies on the ground?

A. Yes, I have.

Mr. Galles: I wonder if we could have it identified without the view of the jury? Perhaps it could be turned away from their view until it is received in evidence.

The Court: Mr. Galles, can you agree on it, or will there have to be a foundation laid?

Mr. Galles: I haven't seen it before.

The Court: Well, take a look at it, and maybe one of your witnesses, or some of them. You might want to have them look at it.

(Mr. Galles examines map.)

Mr. Galles: Your Honor, with the foundation of a few questions by the witness' counsel on how it was prepared and when, we can agree.

The Court: Very well.

Mr. Wiggenhorn: May it be turned around so it can be seen?

The Court: Yes.

Q. (By Mr. Wiggenhorn): Can you see that, Mr. Kolstad? A. Yes, sir.

Q. There is now posted upon this board a map which has been marked as Defendants' Exhibit No. 1. Will you state whether or not this map correctly depicts your—in its general outlines and all of the colored matter on that map [52] as distinguished from the white, depicts and shows by legal subdivision the land you refer to as the 17,400 acres ap-

(Testimony of Clarence A. Kolstad.)

proximately that you owned at the time the lands were taken by the government in this action?

A. Yes, that is a description of it.

Q. And there are, as I observe here, numerous colors, that is, the land is marked in different coloration, and is there a key to this map, a legend——

A. Yes.

Q. ——shown at the bottom, with respect to these colors, so that anyone examining it can determine by reference to the legend what these respective colors depict and show? A. That's right.

Q. The first one then, I notice is a red color, let us call it, and that is marked "tillable," is that correct? A. That's correct.

Q. And does all of the portions of this map that are in red correctly depict the location of the ground of your operation that is tillable land?

A. Yes, it does, as close as I could come to it.

Q. Now, let's understand what you mean by tillable. I understand that does not include actual cultivated land?

A. No, that is land that can be plowed and farmed.

Q. So, maybe we had better next go to cultivated land, what color is that represented by? [53]

A. Blue—no——

Q. Well, isn't it black?

A. Black on the cultivated.

Q. You told me once before you were slightly color blind?

A. I'm too far away without my glasses.

(Testimony of Clarence A. Kolstad.)

Q. This is blue (indicating). I think the black is——

A. That's right, black.

Q. And it is so shown on the legend, is it not?

A. Yes.

Q. I think there it is called what?

A. Plowed.

Q. The word "Cultivated" nowhere appears on the legend, it is called "Plowed"?

A. That's right.

Q. But that means it is actually under cultivation, and was at the time of the taking?

A. That's right.

Q. And then we find in the next color blue what is called bottom land on the legend, and what does that represent?

A. That's the river bottoms along the Marias river and also along Willow Creek.

Q. We might locate these respective streams. I see here meandering across the southern portion of this map, Exhibit 1, what is intended to be a river. Is that the Marias River?

A. That is the Marias River. [54]

Q. And over here to the right is another line, that is, not a parallel line, but is an individual line. What stream is that, if any?

A. Willow Creek.

Q. And Willow Creek joins and flows into the Marias River somewhere near your place?

A. Right down there (indicating). In fact, I own the mouth of it.

Q. You are pointing to it on the map here on the southeast corner of your map?

(Testimony of Clarence A. Kolstad.)

A. That is right.

Q. Your lands extend right to the juncture of those two streams, does it? A. Yes.

Q. All right, let's go ahead, then. The blue is marked "Bottom Land," that is what I am pointing to right here so you and I agree what is blue?

A. That's right.

Q. You might tell us what you mean by bottom land?

A. Well, it is the bottoms down in the river, the flat bottoms. Some of them are clear and some of them have brush on them, but it is the level portion before you go up into the breaks, the level portion down at the river bed.

Q. You might elaborate a bit more. What I would like to have the jury understand is the topography of both the Marias [55] River and Willow Creek insofar as it recedes, as the land gets away from the bottoms itself. Are there benches there of some sort?

A. Well, there is the bottoms first that are close to the river, and sometimes there is a little ledge and then a second level before you get to the river breaks, which are rough, of course, and then on up to the top land. There are quite a few benches in that blue color.

Q. And along the Marias River as well as along Willow Creek, are there also some irregularities, bluffs, and things of that sort? A. Oh, yes.

Q. What is the nature, generally, of these bot-

(Testimony of Clarence A. Kolstad.)

toms, of this bottom land, is it brushy and willowy and trees in it?

A. Some of it has trees and some of it is fairly clear, but it is all level land, it is bottom land.

Q. It is the sort of land that you find characteristically and typically in Montana, and in this particular region of Montana, where there are streams?

A. Well, along the Marias and Missouri Rivers anyway. Those are the ones I am most well acquainted with.

Q. What did you say about the Missouri?

A. You find it typical of the Marias and Missouri Rivers.

Q. Is this bottom land cultivable or land that can be farmed? [56]

A. Certainly, it is land that can be irrigated and put into alfalfa.

Q. Did you in fact have some of it irrigated?

A. Yes.

Q. Well, we will probably go to the next classification, then. I will jump down one and I will call it orange, and it is marked here "Alfalfa." Did you have some of this land in the bottom land that was in alfalfa?

A. Yes.

Q. At the time of the taking? A. Yes.

Q. And that is marked in orange, is it?

A. Yes.

Q. And you can readily find it on the map here?

A. Yes.

Q. That alfalfa land that you have there, you

(Testimony of Clarence A. Kolstad.)

spoke of it as being irrigated. Was it all actually irrigated?

A. It was all ditched. I wasn't irrigating it for the last two or three years.

Q. Was some of it subirrigated thereon?

A. Subirrigation. You didn't really need to irrigate it.

Q. But you had in the past irrigated it when it was required?

A. I did, yes. It was all ditched and ready to go.

Q. Well, you might explain what you mean by subirrigated? [57]

A. Well, the moisture from the river bed was high enough up to the level of the ground that the alfalfa roots reached it.

Q. In other words, that was characteristic of this bottom land? A. Yes.

Q. While we are at it, will you also locate such improvements in the nature of buildings or structures that you had on the land at the time of the taking? Maybe you had better come down here and point that out. Step over here where I am.

A. What do you want to know?

Q. I was asking where your buildings are located?

A. There was a set of buildings that we used for the wheat farm——

The Court: You will have to speak up, Mr. Kolstad, so that we can hear it over on this side, too.

Q. You are now pointing at what is marked here with a square in—let's see if I can locate it.

(Testimony of Clarence A. Kolstad.)

A. Section 32.

Q. 32. Township and range, please?

A. 31 North, range 4 East.

Q. I might pause just a minute, Mr. Kolstad. In what county or counties is this land located?

A. Toole County and Liberty County. [58]

Q. Where is the county line?

A. Right down there (indicating).

Q. You are now pointing to approximately the middle of the map, are you not? A. Yes.

Q. So that line almost bisects your farm, does it?

A. Yes, that is true.

Q. There is a substantial amount of your land on both sides? A. Yes.

Q. Liberty County is to the east or right of it, and Toole County to the left? A. That's right.

Q. Well, now, let me get back again to this point you indicated here, that would be in Liberty County?

A. Yes.

Q. It is where your buildings were located for what purpose, for what use?

A. Mostly for farming. It was centrally located to the fields around.

Q. Did you have any other central location of buildings?

A. We did have down here in Section 24 (indicating), just over the line in Toole County, we had a complete set of ranch buildings there.

Q. And those were also used as a headquarters for your [59] ranching operations?

A. Yes, they had been in the past.

(Testimony of Clarence A. Kolstad.)

Q. Are there any other improvements—where—were there any bridges across the Marias River that are important for reference points?

A. Yes, right here (indicating) was what we call the Turner bridge.

Q. You are pointing to what, what location?

A. Well, it is in Section 14.

Q. Toole County?

A. Yes, 30 and 3. It is what is known as the Old Bootlegger Trail. It comes down here (indicating)——

Q. Following the road now that you are pointing at?

A. Yes, coming down here (indicating) from Galata and going over through here (indicating).

Q. It is shown on the map, isn't it?

A. Yes, and you went down and crossed the bridge and on to Great Falls.

Q. Right along through your bottom land, your alfalfa?

A. Yes, right along through the alfalfa.

Q. Was there any other point of crossing in Willow Creek, or along Willow Creek, commonly used by you in handling your entire ranching operation with machinery?

A. Yes, we had two crossings for machinery there, and then we had a bridge. [60]

Q. Now, you are pointing, when you said two crossings, to what location? One is near the buildings, isn't it?

A. Yes, and there was another one a little wider

(Testimony of Clarence A. Kolstad.)

to cross with wider equipment, and then there was the bridge across the creek.

Q. That is on the——

A. That is the road that comes down.

Q. You are now pointing to what line? Is that a section line?

A. That is a section line.

Q. Between Sections 16 and 17, and the corresponding sections on the way down. These crossings that you referred to, were those in the nature of fords?

A. Well, yes. Of course, your summer creek doesn't run only very shallow, and eventually stops entirely, but we always cross the equipment through the summer creek.

Q. What do you mean? Maybe we should know something about these two streams you have described. The Marias River, is that a year around river that flows the year around?

A. Yes.

Q. It flows into the Missouri?

A. That's right.

Q. That carries water all through the seasons, all year around?

A. Yes, it never goes dry. [61]

Q. And what about Willow Creek?

A. Well, it always runs in the spring, probably until about the 4th of July, sometimes earlier, and sometimes it runs later, but the average for it. It empties in the Marias River here (indicating); but it has springs in it so that it never really goes dry, there is always good water holes all the way through it, probably every half mile or mile, which can be made—it never goes dry. You can take the bulldozer

(Testimony of Clarence A. Kolstad.)

and go in there and doze it out six feet deep, and it will fill up again with water, the water level is that high. It has always been good stock water.

Q. Now, I see the green designation here in your legend is marked "Grazing." Now, will you point out generally where the grazing land is?

A. Yes, up along the river breaks, what we call the river breaks. They are that far away from the river (indicating), almost a mile, most of them. This is all, most all of this (indicating) is river breaks, not suitable for farming, but good grazing land.

Q. How does that compare with grazing land generally in the vicinity of Chester and that neighborhood?

A. It is all about the same, I think.

Q. Is it considered good grazing land for livestock?

A. Yes, very good, good winter range.

Q. And with respect to these two streams you have spoken of [62] here, were they accessible to the grazing land so the cattle could get, if they were grazing upon it, to water, either in the river or Willow Creek?

A. Oh, yes, those breaks aren't that rough. They are not steep bluffs, they are just rolling hills. There are some steep bluffs over here in places (indicating), but you notice this white land, that belonged to the government. No landowner ever owned it. I leased it, though, from the government.

Q. Before we go to that, maybe I better—before I do that, may we refer to this sheet such as I am showing you here as an overlay?

(Testimony of Clarence A. Kolstad.)

A. That's right.

Q. You will know what I mean when I use that word. It is a transparency, as are the others. I will ask you, that appears to have markings or colorations of gold, and shall we call this bronze?

A. Good enough.

Q. What do these gold areas represent?

A. That is United States Government land.

Q. And these others, the bronze?

A. These two are school sections, and this is state land also (indicating).

Q. You are speaking now again of bronze?

A. Yes. [63]

Q. So all in bronze indicated on the legend here (indicating) is state land, and the gold, if that can be called gold, it isn't particularly gold, I know, is United States Government land? A. Yes.

Q. Now, in addition to what you have shown here, do you have any rights upon any of those lands at all? A. Well, I have them leased.

Q. They are leased. Now, I think we made a mistake in this map, so let's correct it. Do you show anything on this map that is not in fact leased by you?

A. Yes, this piece here (indicating) is outside of mine, the map is wrong there, and this piece here is not leased by me (indicating).

Q. So they really shouldn't be on this map at all?

A. No.

Q. Insofar as this gold represents United States Government land leased by you, it is correct, except-

(Testimony of Clarence A. Kolstad.)

ing for the two pieces you have indicated, two pieces, one of them on the east portion of the land about the center of the map, and the other one the southeast portion of the map, is that right? A. Yes.

Mr. Galles: Would it be possible for him to write on those two pieces?

Mr. Wiggenhorn: Let me see, mark the word "out" on it. [64]

(Witness does as requested.)

Q. What about this one (indicating), is that all right or not?

A. I have got part of it. I don't just exactly know where. You can mark it out if you want. When we fenced, we followed the least line of resistance between the two.

Q. On that portion which is gold and on which you have written the word "out"—there is separate units of it—that is not leased by you although it is government land? A. Yes, it is.

Q. As to the bronze portions, again referring to them, they, I think you told us, were state land, and in all three cases, you have leased them?

A. Yes.

Q. No error about that, is there? A. No.

Q. And those leases were in effect at the time the lands were taken from you?

A. Yes. They are still in effect.

Q. Just one minute more and see if—I happen to notice another color here. What do you call that, black, is that it?

(Testimony of Clarence A. Kolstad.)

A. Black, yes. You are color blind, too.

Q. I resent that. That we identified before as plowed, and that means, of course, it is [65] cultivated?

A. Yes.

Q. And underneath that, we have an orange, or is that yellow?

A. Well, I would say it was yellow.

Q. Okay, yellow. That is marked "Breaking." Identify portions of it on the map, will you?

A. This part on here (indicating).

Q. What do you mean by "Breaking" when you so mark it?

A. It is newer ground. It has all carried one crop, and some of it two.

Q. It hasn't been in cultivation for a long period of time?

A. No.

Q. You saw fit to distinguish it from the cultivated land that has been cultivated and producing crops, or has a history of producing crops?

A. Well, I did it for my own convenience so I could identify it.

Mr. Wiggernhorn: It is 12 o'clock. Shall we suspend, your Honor.

The Court: Very well. (Jury admonished.) Court will stand in recess until two o'clock.

(Noon recess.)

CLARENCE A. KOLSTAD

Direct Examination

(Resumed)

By Mr. Wiggenhorn:

Q. This entire property that is exhibited here in your [66] Defendants' Exhibit 1 that you have described to us and the manner in which you acquired it, is that operated as a family between yourself and your wife, or in what fashion do you operate?

A. We operated it with the same unit. The boys—we operated it all in one unit, the 3,200 acres that are over east of that, and this acreage here (indicating).

Q. You might explain what the ownership of your wife is, and your own ownership with respect to this 17,000-odd acres shown in Exhibit 1.

A. Well, in the beginning in 1942, when I first bought it, we bought two ranches, as I testified to. My wife bought what was known as the Sailor ranch, and I bought what was known as the Martin Wasesha ranch, so that she owns that in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy.

Q. Well, substantially, without going into the exact details of it, then, your wife owns approximately half of the land and you own approximately half?

A. That is close enough.

Q. Some of it in joint tenancy and others individually owned by her and individually owned by you?

A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And while it is probably not important, but when you say [67] that your wife bought one ranch, that was bought with her own money?

A. Yes, it was.

Q. It was actually her ranch? A. Yes.

Q. It wasn't just a husband and wife deal where you had it deeded to her in her name? A. No.

Q. Bought with her own money.

The Court: Counsel, may I inquire, are we going to run into a problem here in connection with what we have in conference discussed? There being separate ownerships, I wonder if maybe we shouldn't have a further conference?

Mr. Wiggenhorn: Whether we had a conference on it or not, we should have an understanding, I suppose.

Mr. Galles: I just suggested to counsel, your Honor, that we could stipulate that one award could be made for the ownership, even though it is owned separately or jointly, as the case may be.

The Court: You are not going to object to evidence, then, either, with reference to its use.

Mr. Wiggenhorn: I believe we had a——

The Court: Maybe we had better have our discussion outside of the presence of the jury. (Jury admonished.) Kindly step out of the [68] Courtroom.

(Jury withdraws from courtroom.)

The Court: Mr. Wiggenhorn, when we were discussing it, I understood this was one ownership, and

you had suggested to me some of the proof that you were going to make, and, of course, I don't see how it is possible, except by stipulation, to permit you to show a value of a 17,000-acre tract, if it is only 11,000 acres in the one ownership.

Mr. Wiggenhorn: Well, technically, that is correct. Straighten me out if I am wrong, Mr. Galles. Maybe tentatively, maybe by word or understanding, but I got the impression, at any rate, when we entered upon the trial of the case because of something that occurred at the very beginning, that we were going to try this as if it were one ownership, a family unit, with one award interchangeably with respect to the two defendants without any distinction between them at all. Is that wrong, or is it right?

Mr. Galles: Well, I was thinking that the award should cover all of the property, but I didn't have the understanding that the unit rule would apply to the separate ownerships. In fact, I hadn't given it too much consideration. I do recall that we had a talk about it.

The Court: Well, you see, the matter just occurred to me because I thought this was one tract and one ownership.

Mr. Wiggenhorn: I am frank to confess to the Court that I am not able to state which belongs to which. [69]

The Court: Well, I know, but we are going to have to find out.

Mr. Wiggenhorn: I am frank to admit that from the beginning we were going to try it as though there was a unity of ownership, as a family unit. I don't

mean to suggest to the Court that this is completely sound, but it occurs to me where it is a husband and wife deal and operated as one unit, and a partnership return made here——

The Court: Well, you may have a partnership for the operation of the ranch, but you don't have a partnership in the ownership of the land.

Mr. Wiggenhorn: Well, if it is a partnership and each partner dumps in his holdings, even if there is an agreement——

The Court: Yes, but he can withdraw them at any time. I am just at a loss here to understand how we can proceed. Let me say this, are you employed by Mrs. Kolstad, for example? She doesn't seem to be here.

Mr. Wiggenhorn: That is true. Again, so as not to deceive the Court, I am told by Mr. Kolstad that I am employed by her. I never met Mrs. Kolstad personally.

The Court: Well, it is a little difficult. I don't know how I can—in other words, I have some responsibility here, too.

Mr. Wiggenhorn: I should probably say I am employed by Mrs. Kolstad, because I think in the matters we had pending [70] in Butte, she signed the request for withdrawal of one counsel as the substitution of our names as attorneys for herself as well as Mr. Kolstad.

The Court: Well, you can see what your situation is, however. Just assuming these figures, that this is a 17,000 acre tract altogether, and Mrs. Kolstad owns 5,000 acres of it, then you have one five

thousand acre ownership and one 12,000 acre ownership, and we have got two cases here.

Mr. Wiggenhorn: I should suppose—again maybe I am not too practical, and I full well appreciate what the court has suggested that a partnership is subject to dissolution at any time upon the whim of either partner, but as long as it is in existence and continuing, it isn't dissolved and it is subsisting, and partners can, of course, arrange between themselves that they shall share in the profits. Now, I appreciate the problem the government is concerned with here. This award should be made according to the ownership, but on the other hand, if again the partners are in agreement that whatever the award is for their lands, whether belonging to one or the other, should go into the partnership pot, that should satisfy any——

The Court: Well, that would satisfy the government with reference to what happens to whatever money they get, but the question here is what money do they get. Now, as I understand what you suggest, you are going to prove that because [71] this is what you call one unit, it has a peculiar value upon the market.

Mr. Wiggenhorn: It has a greater value.

The Court: Now, as I understood it, that is what you were going to prove, this is one. Well, now, if the fact is that it isn't one, I can't close my eyes to that and say, "Well, let's pretend it's one."

Mr. Wiggenhorn: But it becomes one, doesn't it, when Partners A and B join forces and operate it as one?

The Court: I don't think so.

Mr. Wiggenhorn: I should think it would be one just as much as any other partnership that owns property.

The Court: Well, you could take—the partnership may—you don't have to have a partnership if that is true, skip it. It's possible to have a partnership. You could take every ranch in the county and say, "Well, now, if all of the individual owners here got together and formed a partnership, they could operate it more economically, and that would be reflected then in the market value, so let's just value the whole county."

Mr. Wiggenhorn: Well, if we carry it one step farther, and neighbors A, B, C, D, all join forces and decide they will operate as one unit and operate it as one unit, even to the extent of possibly issuing shares against what have you, evidencing their ownership in the unit, once it is dissolved, [72] why it goes back to them, but in the meantime, while they are operating as one unit, they get the benefit of unit operation, and the value is accordingly.

The Court: There may very well be a situation in which parties join as you suggest and issue shares, which upon the dissolution of the association, the property might go back into the individual ownership, but there would then be legal title in the association, and you would have but one unit, that is, one legal title. I am at a loss to see how you are going to proceed further under the theory that you have. We can try these two cases here, of course, but we can't try them under the theory you have if they

are separate units. You will have to show me some authority. I can't otherwise understand how it can be done.

Mr. Galles: Your Honor, my suggested stipulation was just as to the division of the award, and not as to ownership. The division of the ownership does create a definite problem as to the unit ownership of the various units that are then left or being taken insofar as it affects the market value. In this situation, you would have to have a unity of agreement between the buyer and seller to sell their joint ownerships when there is no guarantee that that agreement can be reached.

The Court: Well, it is just a situation I don't understand. You see, when you take two separate ownerships, and say, "Well, if we operate them together, we have a better unit, and thus [73] a unit which has a different market value," we are just dealing in speculation, and dealing in business profits and personal considerations that are not admissible or not part of the legal concept of market value.

Mr. Wiggenhorn: I must confess, your Honor, that whether justifiably or not, I am not attempting to say, I entered upon the trial of the case and came here to try it with my own conception that we were going to try it as one unit.

The Court: Yes.

Mr. Wiggenhorn: I doubt if counsel himself has given thought to it.

Mr. Galles: That's right.

The Court: Well, that is what I say. It seems to me that neither one of you have given thought to it. I have raised the question. I don't think that either one of you thought of it.

Mr. Wiggenhorn: Frankly, one thinks of husband and wife as one person. I am not so sure—I, therefore, did not brief it. I am not willing to confess for a moment that I might not be able to find authority and justification for trying it just as we are trying it now. Had I been confronted with the problem, had I thought it was a problem and would have been a contested one, or might have been contested, and had I not been, rightly or wrongly, lulled into the idea we [74] were going to try it as one unit, why I would have briefed that as one of the most important points in the case.

The Court: I would think so.

Mr. Wiggenhorn: And I would have been prepared to argue it.

The Court: I would think so, because immediately upon the fact coming to my attention, I immediately thought it was the most important matter raised in the trial of any case that we have had here.

Mr. Wiggenhorn: I would really not impose myself on the court to attempt to argue the matter. I am only arguing it on a common sense basis. I have nothing to back it up with.

The Court: No, I know. I am just about in your same position, counsel, except that I do have to make a decision whether I have got any authority or not for it. That is the position I am in. Now, it being im-

portant, we are going to save ourselves a lot of time to find out right now.

Mr. Wiggenhorn: It is important for more than just the moment, too, because if we commit error either way, why——

The Court: Well, what is the use——

Mr. Wiggenhorn: I am frank to say I don't want to commit error myself, because I don't want the case appealed.

The Court: That's right. Well, I don't care about it being appealed, but the fact is, we would have to try it again, and [75] that is what I don't want to do. I take no pride in always being right or that I not be reversed. What I want to do is protect myself and you and the people involved from having to go through all this once again, so it would seem to me that probably what we have to do is take a recess and look at the books.

Mr. Wiggenhorn: I think we should.

The Court: Well, we had better call the jury back in to do that. What do you think, should we recess for the rest of the afternoon?

Mr. Wiggenhorn: I guess probably we can't do it justice without that.

The Court: All right, bring them in.

(Jury returns to Courtroom.)

The Court: Ladies and gentlemen of the jury, a problem has arisen concerning which I have to make a decision, and I have asked counsel to spend some time looking at books to assist me, so we will have to take a recess in the trial of the case, so you are ad-

monished once again by the court not to discuss the case with each other or anyone else, nor to permit yourselves to be addressed by anyone concerning any issues of this case. Do not form or express any opinion in the matter until the case is finally submitted to you——

Mr. Wiggernhorn: It just occurred to me, if we could recess until four o'clock, it might be possible we might [76] arrive at some solution at that time, and it would probably be possible——

The Court: Well, that is inconveniencing the jury. If we are going to recess for that length of time, they might as well have the rest of the afternoon off and maybe they can do something in the afternoon. You are excused from further attendance upon the court until 10 o'clock tomorrow morning. Be back at that time. Court will stand in recess.

(Thereupon, a recess was taken until 10:00 o'clock, a.m., the following morning, December 13, 1956, at which time the following proceedings were had in the absence of the jury:)

The Court: Proceed.

Mr. Wiggernhorn: May I proceed?

The Court: Yes.

Mr. Wiggernhorn: At this time, because it now appears that it is necessary in the trial of this proceeding to establish and separate the identity of the precise lands owned by each of the defendants individually and as well as those held by them in joint tenancy, and through mutual mistake of the parties plaintiff and defendant, it was assumed that defend-

ants' individual ownership could be ignored, and for the purposes of determining their just compensation, their ownership could be treated as a single unit, and the witnesses of both sides are not prepared at this time to testify with respect to damages to each individual owner, and [77] will require time to prepare themselves to so testify. The defendants now move that the further trial of this proceeding be recessed for continuance of the trial at such date as may be fixed by the Court, the present jury to be excused and ordered to return for completion of the trial at such time. Now, may I have a few moments, your Honor, to explain my thinking——

The Court: Yes.

Mr. Wiggenhorn: ——and reflections on the way this thing now appears to me. I can make some confessions and admissions that are good for the soul. I believe, to start with, we have to be careful, and I confess I for one have not fully appreciated that——by the way, you won't have to take this, Mr. Reporter.

The Court: Well, we report everything in the Federal Court, counsel.

Mr. Wiggenhorn: I may be talking too fast. What I was trying to tell your Honor was that it is necessary and important at the very outset to distinguish between the taken lands, the lands taken, and the identity of those lands, and the lands that are left to the parties, if any, and that is something that I had not been thinking about, and I believe probably when counsel for the government and myself had this bland understanding, and I think we

both acted in good faith, and both thought we understood one another, and we did, [78] neither of us, at least I am speaking for myself alone, gave distinction to the fact that it is important and distinction must be noted, for the reasons I am about to point out, between the lands left to these defendants for which we are allowed to claim severance damages and the lands taken. Now, I am free and frank to confess to your Honor now, and I'll clear that up so that there will be no misunderstanding, that with respect to the lands remaining to these defendants, I fully agree with your Honor's conception of the matter called to our attention yesterday, that there can be allowed no confusion as to the identity of ownership with respect to those remaining lands. In other words, if there is any severance damage in this case on the part of defendants, it has got to be individual severance damage on the part of each of those defendants, and it has got to be so determined, it cannot be treated as a whole, even, as your Honor suggested, were there agreement to that effect.

It is quite a different thing, as I view the matter, with respect to the identity of the lands taken. In the first place, the statute itself under which we are proceeding makes clear what may be done in a case of this sort. I don't have them here, Mr. Galles, but I have some notes on my own, and if this wants to be verified, it can be done. I am reading only from my notes. The statute provides, and I may read some portions that are not completely in point—— [79]

Mr. Galles: Pardon me, is this 71(a) or——

Mr. Wiggenhorn: This is Section 40, 258(a),

“The petitioner may file with his petition a declaration of taking signed by the authority empowered by law to acquire land, declaring that said lands are thereby taken for the use of the United States. Upon the filing of this declaration and the deposit in court to the use of the defendant of the amount of the estimated compensation stated in said declaration, title in said lands in fee simple shall vest in the United States, and said lands shall be deemed to be condemned and taken for the use of the United States”—and I am quoting now—“and the right to just compensation for the same shall vest in the persons entitled thereto.” That is the end of quote, and just compensation shall be ascertained and awarded in said proceeding and established by judgment therein. Now, the proceeding here, and by the way, I am frank to confess I have not the complaint, and I think counsel will understand why I don’t have, because I haven’t been in the case until recently, but I suppose it proceeds on the same basis as the notice, which I do have before me proceeds, and the notice refers, and you can correct me if I miss anything here, Mr. Galles, the notice, in the first paragraph, notifies the defendants that the United States—that this is an action to condemn certain property described in schedule “A,” and, of course, schedule “A,” it would [80] appear, is nothing more than the land description, “attached hereto and made a part hereof, for use in connection with Tiber Dam and Reservoir,” and so on. Now, then, continuing, we find on the second page just before the separate

parcels are described, the notice continues, "You are further notified that the persons having or claiming any interest, or who may have or may claim an interest in the property described in schedule "A" hereto attached, whose names are ascertainable by reasonably diligent search of the records, and those whose names have been otherwise learned of." There follows then, the names—I should continue, "Parcel No. 10" are the next words appearing, in other words, it is by lead or heading of what is referred to in the previous language. In Parcel No. 10, the names of those owners appearing are C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife. Now, then, I take it that those other names appearing are the ones that counsel read at the outset of the case as to defaulting for failure to appear. But the point of interest and importance here is that we are told here now that as to this particular parcel—and let's be sure now what we mean by the parcel, it is the parcel taken, it is a piece of ground about 9,000 acres altogether, it is a parcel, and as to that, the owners are these two individual defendants. It is not stated that there is diversity of ownership. We are merely advised, [81] and, of course, there could be no particular reason why it shouldn't be done—that these two people own the land in some manner or other, and they are the ones that are here appearing to defend. Now, it is my contention that insofar as ownership is concerned, or to carry that on through, insofar as any compensation that may be awarded to these defendants is concerned, that that is a matter that the

United States has elected in this action to ignore, if there is any diversity of ownership.

The Court: Do you have any authority for your position?

Mr. Wiggernhorn: Well, I think I have, yes. By the way, I want to say I take the view, before I refer to this, I take the view that it is entirely up to the defendants themselves, once—I maybe better announce my position so your Honor will understand it. I think that we are arguing about something that is completely inconsequential, and is a matter concerning the defendants only. Suppose we had complete diverse defendants, two or more, half a dozen, A, B, C, D, they were all strangers to each other, and each of them owned in some manner individual portions of the part of the land taken, and that is the part we are referring to here, and supposing they didn't see fit—there is a proceeding provided whereby they may assert their rights, as I take it, as I understand it—but supposing they didn't see fit to worry about that at all, it was quite agreeable to them that the [82] jury, who are making the determination here, make one determination, one figure for just compensation for the parcel, for the parcel mind you. Now, if they wanted to take that pot of money among themselves and walk out of the courtroom and distribute it as they saw fit among themselves, the government would be fully discharged once the government has paid the money in response to the finding of just compensation, and what they do with it, or how they divide it wouldn't worry the

plaintiff at all, so long as the plaintiff was discharged.

The Court: Counsel, I personally think you misconceive the thing entirely. The parcel that is taken by the government is just the government's determination of what they want to put in one taking. It doesn't have to be all of the land taken, and after the government sets forth the parcel and after the case comes before the court, I can now separate these separate ownerships and have a separate trial on each one of them.

Mr. Wiggenhorn: As to the one parcel?

The Court: Of course.

Mr. Wiggenhorn: I wouldn't even argue the point with you, but the point I am making is——

The Court: That is what we are going to do with part of this, as a matter of fact, and you have agreed that it be done. [83]

Mr. Wiggenhorn: No, that is not quite right, your Honor. We have another case.

The Court: Pardon me, parcels within the case, you mean, those are separate parcels.

Mr. Wiggenhorn: I want this to be made clear: There is another parcel of land, Parcel No. 11, which counsel and myself had agreed we would try in this action. As to that, I was going to mention it before I got through.

The Court: Well, the fact remains, counsel, that in the trial of this kind of a case, you can have a parcel, as you call it, a description of a vast amount of land, in which there are separate ownerships, 10 different ownerships. So far as this court is con-

cerned, and so far as the law is concerned, I can make 10 cases out of that.

Mr. Wiggenhorn: I don't challenge that. I am merely attempting to point out that whether your Honor would be so disposed or not, that so far as the government is concerned, so far as anyone is concerned with the trial of the action, the only one who could be hurt would be the defendants, and if they don't assert it, if they don't ask for it, and if they are perfectly willing to take the money that is received in payment of just compensation among themselves in one jackpot——

The Court: Well, I think you misconceive the purposes of this court, too, then, because the Court has to, in the first [84] place, find that these are the owners. I can't. I am not going to sit up here and try a case and permit a jury to grant compensation to somebody who is not an owner.

Mr. Wiggenhorn: Yes, but they are owners of some part of it.

The Court: These happen to be the owners of some part, but I am not going to permit a jury to grant compensation to them for a taking of which they are not the owners. Now, what is the purpose of this? In other words, do you want the court to take the position that insofar as your proof is concerned, you can enter proof as to one parcel?

Mr. Wiggenhorn: I am probably premature, but I didn't want any misunderstanding when we come back here.

The Court: Well, I am glad you don't because if

that is your position, we are not going to have a continuance.

Mr. Wiggenhorn: My position is this: That when we do resume the trial of the case, what would ultimately follow from my conception of this would be that the question of value of the lands taken would be in one unit, that would be determined in one unit. The question of severance damages would have to be individual.

The Court: Well, unless—do you have some case authority for me? I would be glad to look at it.

Mr. Wiggenhorn: Well, of course, your Honor has almost indicated it would be useless for me to suggest it. [85]

The Court: Suggest what?

Mr. Wiggenhorn: That I have any case or any authority for it.

The Court: Well, no, I am telling you what my view is, I haven't ruled on it yet. If you will give me a case, I will be glad to read it.

Mr. Wiggenhorn: Well, possibly the statute itself will throw some light on it. I suggest—I am referring now to the rule, 71(a), would throw some light on it as a matter of procedure.

Mr. Galles: Well, that, your Honor, I think, is the distinction. One is the procedure where any amount of land can be included in one action regardless of ownership, and the other matter is one of proof so we can arrive at fair market value.

Mr. Wiggenhorn: It is a matter entirely of proof. I wanted to be sure when I returned here, I wouldn't have any misunderstanding.

The Court: Well, just so you understand what my position now is, and that is that separate owner-ships will have to be tried separately, that is, we can try them all at one time like consolidating cases for trial, but I don't conceive that it is possible for all of the owners within a parcel, just because the government has named a parcel, artificially named it, that all of the owners in that parcel may proceed to [86] show a joint operation, or joint—one compensation.

Mr. Wiggenhorn: May I suggest this, your Honor?

The Court: Yes.

Mr. Wiggenhorn: I think I understood what your Honor has indicated that if it were to be otherwise, why you would proceed with the trial of this action. I will state with regard to that that whatever your ruling is at this time, if you will grant the motion, why I will adhere to that, and I won't ask for any conditions or anything of that sort, but I do not see why when we come to resume trying this action, if I had the opportunity in the meantime to prepare a brief and submit it to your Honor, it would be entirely a matter of the admission of evidence, and then we can preserve our rights at that time if your Honor rules against me on the manner in which the evidence should be submitted to the jury. We can try it at arm's length and we can make an offer of proof or whatever we——

The Court: Counsel, I am here to try the case now, and I am willing to make a ruling.

Mr. Wiggenhorn: Well, I don't believe we have arrived at a time to make a ruling.

The Court: No, that's right, we haven't yet. I raised the question for your benefit, not for my benefit, because from what you told me, it appeared to me you had misconceived, as I view the law, so I raised the point for your benefit, not [87] for mine. I am ready to proceed with the trial. We have got a jury here, we have gone through a lot of time, my time has been occupied, the court's time, counsel, witnesses and jurors, and it is an expensive procedure, and I want to continue the trial. On the other hand, I can appreciate the difficulties that the owner, for example—that is who I am concerned about. I want them to have the opportunity to get just compensation, and I want them to have the opportunity to have that determined, and so, in order to give them that opportunity, I suggested that I might be willing to recess the trial of it, but if we are going to recess it upon the basis that there is going to be another contest as to what my ruling is, I am not going to bother doing that, I am wasting time. I'll rule now. Go ahead and try the case, and I'll rule.

Mr. Wiggenhorn: Supposing your Honor should be wrong?

The Court: Well, that's simple, I'll be reversed.

Mr. Wiggenhorn: Well, I know, but——

The Court: That happens in every case you try, you may be wrong.

Mr. Wiggenhorn: The point of the matter is, I am sure your Honor would want authority, whatever authority there is.

The Court: Well, yes, let me say this——

Mr. Wiggenhorn: I am completely convinced I am right, your Honor. [88]

The Court: Well, of course, every lawyer that ever makes a suggestion, I give him the benefit, I give him credit for saying that he is not trying to mislead the court, he is trying to tell the court what the law is.

Mr. Wiggenhorn: I am also convinced that if I came back here with a brief that I could convince your Honor.

The Court: Well, that may be a different matter, and I would say this: that if you did do that, I would change my ruling, but I don't want to be in the position that if I don't change my ruling you are going to make that the basis of an appeal.

Mr. Wiggenhorn: I don't quite follow the implications of that, but your Honor is not unaware that in the trial of every action, counsel is rebuffed, he has his own theories. When he offers—let's take in the admission of testimony. He offers certain testimony or tries to and objection is sustained. You wouldn't expect him to do other than proceed regularly and make an offer of proof.

The Court: That's right.

Mr. Wiggenhorn: Also, the motion to deny that offer of proof is also granted, as is expected, and then we proceed to take the alternative and offer some other testimony. Now, what I am getting at is I don't want to be foreclosed at this time from searching for authorities and coming back——

The Court: Well, you are going to be, you don't want to be, [89] but you are going to be.

Mr. Wiggenhorn: I want to satisfy your Honor, I really do. My position is that——

The Court: I understand your position clearly. You don't want to be foreclosed, but I am telling you you are going to be.

Mr. Wiggenhorn: I hope you are wrong. My position is this——

The Court: Well, I am not going to listen to any further argument about it. We are going to proceed with the trial of the case, if that is what you want to do. Otherwise, if you want it continued on the basis I have suggested, I will be glad to continue it.

Mr. Wiggenhorn: Your Honor gave me the out a moment ago that if I succeeded in changing your mind——

The Court: If you succeed, why that will be fine, of course, but I am not going to permit you to use that as a basis for reversal of the trial of the case, so you will understand that. Do you understand that, sir?

Mr. Wiggenhorn: I am confused now. I have been over that before.

The Court: Well, if you are confused and you don't know where you stand, counsel, I would suggest that you proceed with the trial.

Mr. Wiggenhorn: Well, may I say this, maybe I can make [90] this thing clear. Do I understand by that that as a matter of good faith when I come back here that if I think your Honor honestly believes

your Honor is in error in ruling against me should you do so that I must not then preserve rights by making an offer of proof?

The Court: That is just exactly right. I say that you have got an opportunity now to try the case on any theory that you want, and I will rule on it.

Mr. Wiggenhorn: May I add one thing more. I think your Honor is under the belief that the situation we find ourselves in here now is my fault.

The Court: Well, I don't know who else's fault it is.

Mr. Wiggenhorn: It is equally counsel's for the government. We had an understanding——

The Court: Counsel cannot be equally responsible. Each one of you has a full responsibility.

Mr. Wiggenhorn: Very well, it is not solely my fault.

The Court: It is so far as your part of the case is concerned, it is wholly your responsibility.

Mr. Wiggenhorn: I will accept that, your Honor, and I won't run away from it either, that is quite true, and I'll tell my client that, too, but I want your Honor to know that I am not the only party, in other words.

The Court: Why quite obviously, counsel, all of you apparently misconceived the law. [91]

Mr. Wiggenhorn: We talked the matter over, and we had a certain understanding.

The Court: Yes, that happens every day, lawyers on both sides don't know what the law is. I am telling you what it is, what my view is. If you want to try the case, you may try it, but I am not going to fool around and go to the expense that we have

already gone to, and then come back for further expense, and then have to go through this whole argument again. I am ready to rule, if you want to try the case, proceed now. If you don't want to try the case, acknowledge that my view of the law is correct, and that you are not going to appeal from that view and use that as the basis for an appeal.

Mr. Wiggenhorn: All right, your Honor, subject only to this: I might be able to change your mind when I get back.

The Court: Indeed, you may have full opportunity, and I will be glad to study it. I don't take any great pride in any view of the law that I have. As I have asked you now, if you had a case, I would be very happy to look at it, and I will be happy to look at any case in the meantime that you present me with, or any brief. I will be happy to have you present a brief on the matter.

Mr. Galles: Your Honor, it puts the government in rather a peculiar position in not knowing whether we should [92] come prepared for the total ownership theory of proof or of the divided ownership.

The Court: Well, in order to protect you, I'll give Mr. Wiggenhorn a week within which to submit a memorandum to me, and I'll notify you just as quickly as I can what my position is, if there is any change in it.

Mr. Wiggenhorn: That will be swell.

The Court: Very well, call the jury in.

(Jury returns to the Courtroom.)

The Court: Ladies and gentlemen of the jury,

you will recall yesterday afternoon I raised a point with the lawyers and asked them to look at some law. It appeared to me they had misconceived the law as it applied to this case, so upon an examination it does appear that happened, and as a result of that it is necessary for us to take a recess of some considerable time to permit the parties, both the government and the landowners to re-examine the facts and how to present them here in court. It is going to take some time, so as a result, we are going to have to recess the trial until a later date. I am not able to fix the date yet, but it will be some time in January when I am back up here finishing up other cases that have to be tried during this term of court, so this case will just be recessed. You will remain the jurors in the case, and we will pick the case back up at a later date, as I say, in January, when I am back up here [93] trying those cases that remain to be tried, so it is very important for you to pay attention to the admonition of the court in this long recess—it will be a recess of a month, actually, and you will remember, as jurors in the case, it is going to be important to keep in your mind the admonition of the court that you are not to discuss the case or any part of it or anything that has gone on here in court with reference to the case, just don't discuss it. If anyone asks you about it, tell him you are a juror and the Court told you under the law you are not to discuss it and let it go at that. Don't discuss it with each other or anyone else, nor permit anyone to talk to you about the case. Don't form or express any opinions in the matter. Stay away from that sort of

thing entirely, and as I say, you will be notified later and we will reassemble and continue on with the trial of the case in the light of the law as the court has found it to be, so you are excused now until Saturday morning at ten o'clock. We have another case that will start Saturday morning at 10:00 o'clock, so you are excused now until that time. Court will stand in recess until Saturday morning at 10 o'clock.

(Thereupon, the further trial of said cause was recessed until January 17, 1957, at 10:00 o'clock a.m., at which time the following proceedings were had:)

Mr. Galles: Ready, your Honor? [94]

The Court: Any other matters to take up with the court before we proceed with the trial of 1726?

Mr. Galles: No, your Honor.

The Court: Very well. Counsel, I would suggest that you haven't gotten very far the last time, but I think that you had better start right from the beginning if the jury is going to be in a position to follow the whole thing. In other words, as you members of the jury recall, we started this case sometime ago, but because counsel misconceived the case, we had to suspend the trial and give counsel time to prepare the case on the law as it exists, and so we will start the trial of the case now just as though we were starting it from scratch.

Mr. Wiggenhorn: Your Honor, I think as we spoke yesterday in your chambers, the United States

Attorney and myself, there were a few preliminary things to be straightened out on the record.

The Court: Yes.

Mr. Wiggenhorn: Do you want to do that in the presence of the jury now?

The Court: Yes, that is fine.

Mr. Galles: May it please the Court, it is stipulated between the government and the defendants in this action involving parcels 10 and 11, that parcel 11 may be consolidated in with that portion of parcel 10 which is owned by Clarence [95] A. Kolstad and Alta Kolstad in joint tenancy. That is the end of the stipulation.

The Court: Do you intend by that stipulation to indicate that the two parcels then become one unit?

Mr. Galles: We intend to indicate that the ownership stands in the same name, but that is as far as the stipulation goes.

The Court: Is that your understanding?

Mr. Wiggenhorn: That's right, the rest will be taken care of by evidence.

The Court: Very well.

Mr. Galles: Further, your Honor, C. A. Kolstad and Alta Kolstad were not named in the complaint as claiming an interest in parcel 11. As I understand it, the fact is that they are appearing here in court today to claim such interest. We are agreeing that the proof and this stipulation may amend the pleadings to that effect.

The Court: Very well.

Mr. Wiggenhorn: Now, then, your Honor, it was indicated that we are starting from the beginning.

I think it would be appropriate and proper to make at least a brief opening statement.

The Court: Yes, I think so.

Mr. Wiggernhorn: May it please the Court, ladies and gentlemen of the jury, some time has intervened since you [96] sat here before, some six weeks, and, no doubt, you have forgotten much of what transpired in the course of the trial of the case before. I am not going to burden you by going over, rehashing, with you what my associate told you in his opening statement other than to probably correct and straighten out what the court has indicated as counsel's misapprehension when we tried the case before. Now, this is the important thing for you to remember and that I should call to your attention: You were told by my associate when he made his opening statement before that we had here a job for you to do as jurors here to determine the just compensation that these defendants were to receive for their lands, and the impression was created before you that there was one—I think counsel so told you—that there was here one unit of land comprising about 17,000 acres, and it was from that unit the government took, as I remember it, about 9,000 acres, and you were going to be called upon to find out what the just compensation was to the defendants as a whole, the defendants being Clarence A. and Alta A. Kolstad, for the taking of this portion of their large tract. Now, it has been straightened out, and that is not the situation, and I am going to see if I can make that clear to you. You are now going to try, in effect, three separate cases, that is

to say, you are first going to be presented with the evidence of Clarence Kolstad's parcel of land, comprising approximately [97] 5,000 acres, and this is not any fiction, it is a fact, and it will be presented in the evidence as land of Clarence Kolstad and none other than Clarence Kolstad, and the evidence will disclose that a portion of this was taken, and what portion was taken by the Tiber dam, as you were told before.

Then, entirely separate from that, and as a distinct question for you to resolve as jurors in this case, you will be presented with evidence of some land belonging to Alta Kolstad independently of anybody else, her own land, Alta Kolstad, as I explained to you, being the wife of Clarence A. Kolstad, but wives in our state being individuals and just as responsible and entitled to own property as us, and she owns land, and the evidence will so show, and again it is in the neighborhood of 5,000 acres, roughly speaking, and of that a certain portion was taken by the Tiber dam and the reservoir made by that dam, and again, you will be asked in your deliberations to determine what the fair or just compensation is for her lands distinct and separate.

And finally, there will be presented to you another case, and this one is a parcel of land comprising about 7,500 acres which is owned jointly by Clarence A. Kolstad and Alta A. Kolstad. This parcel of land again is an entirely separate and distinct parcel of land, and again there was a portion of it taken by the dam and the reservoir, and you will be asked again to determine what the compensation

should [98] be for the taking of that lands, involving in each case the question of how much the balance of the lands remaining were damaged, if at all.

Now, the thing I want to impress upon you, and it probably may be confusing to you because we attempted and embarked upon a job of attempting to prove to you one ownership among the defendants in this case of 17,000 acres, you now have to dismiss that from your mind, and instead, consider each ownership and each parcel by itself as one problem for you to resolve, just as though we had John Smith and John Doe in here, separate defendants, each of them owning a parcel of land.

We will show, and our evidence will show, as probably was told you before in the opening statement, that each of these parcels of land is a large enough unit to comprise what witnesses will refer to as an economic unit, with a sufficiently large acreage of cultivated and tillable land within it to make a very substantial farming operation, wheat farming operation, and one that when disturbed and cut down in size, getting below a certain figure, reduces the remaining value per acre materially.

I think you will be shown as the evidence proceeds that actually, in each one of these cases, one more or less than the other, there were adverse results by reason of taking out the middle, the guts, so to speak, of the land. The [99] portion that was covered by water, or has been covered by water by this dam and lake or reservoir, so we find now, separates the parcels, and the evidence will disclose it to you, which requires that you couldn't farm it as a unit

because it is impossible to get across the lake, except with a sail boat or something similar. Other than that, I think I will leave it to the evidence to bring out the facts in the case. You were told before somewhat the nature of them, and the type of the witnesses we had here.

I think I should mention to you that aside from Clarence A. Kolstad, who will testify concerning value because he was the one that operated each one of these places, there will be brought before you two expert witnesses, and you will be able to judge for yourself their expertness and the types of witnesses they are. I think I can fairly say to you that they are witnesses who are completely objective, if you know what I mean by that, that is to say, they are witnesses who have had no local contact with the country, no occasion to puff it or do anything else but to be completely impartial appraisers, and they are men who have had a lifetime of experience in this type of a job, and that each one of them has a professional pride to bring out, regardless of the results, what the true value is according to expert standards, scientific standards, and I call it scientific because I think you will agree when you hear them that they are men who [100] use scientific methods for their appraisal methods, and when they come up with their values, as they will disclose them and demonstrate them to you, you will know that you are listening to men of authority, who speak with authority, and are not just here to try to testify in our favor or in favor of the defendants in this case, but merely trying to impartially and expertly, with

due respect for their profession, truly present to you what they believe to be—not just by pulling it out of the air, but by expert appraisal methods—the true value of these lands. I thank you very much.

The Court: Do you wish to reserve your statement?

Mr. Galles: Yes.

CLARENCE A. KOLSTAD

one of the defendants, recalled as a witness on behalf of defendants, having previously been sworn, testified as follows:

Direct Examination

By Mr. Wiggenghorn:

Q. Mr. Kolstad, when you testified here before—it has been suggested by the court that we start from the beginning, but I am going to try to make this just as brief as I can, and probably lead the witness a bit in order to save time here, you testified, as I remember, that you were 50 years of age [101] at this time? A. Yes.

Q. And you told us about your early history from your youth, as you, in your youth, in your early twenties, when you were a Deputy Sheriff in Liberty County? A. Yes.

Q. And how you gradually acquired land. And I think we had gotten to the point where you had told us somewhat of your experience in farming in this vicinity. the fact that you had been raised

(Testimony of Clarence A. Kolstad.)

from your boyhood on a farm, and your father was a farmer here before you, is that correct?

A. Yes.

Q. I am not trying to put words in your mouth, I am trying to save time. And I believe you also told us that you pretty well knew and had familiarity with the lands here in the vicinity of Chester where your lands are located? A. Yes, I did.

Q. Now, then, let us now confine ourselves, Mr. Kolstad, to the lands that you yourself own and have owned. It would aid the jury, Mr. Kolstad, if you showed them about the locations in these counties where these lands are. I suppose we should have this marked for identification.

Mr. Wiggenhorn: While we are waiting here, your Honor, I happen to notice this has been marked as Defendants' Exhibit 2. That reminds me that the map we used before is [102] marked "1." It is completely inappropriate at this time, I will suggest, and so ask that Exhibit 1 be withdrawn. It was never admitted.

The Court: In order to keep the record straight, we will have to keep all exhibits in order.

Mr. Wiggenhorn: That's right.

Q. Mr. Kolstad, I direct your attention to a map of Liberty County which has been identified and is marked as Defendants' Exhibit 2. Do you recognize it, and do you know your way about a map such as that? A. Yes, I do.

Q. Now, would you just give us the general location, and draw a rough circle about where your

(Testimony of Clarence A. Kolstad.)

ranch is located in Liberty County, and if it extends over into Toole County—I understand Toole County is to the west or left? A. Yes.

Q. You might point out a few landmarks in the meantime. What is that heavy line, broken line, across the middle there?

A. That is the Great Northern Railway.

Q. And can you point out Chester to me?

A. Right there (indicating).

Q. It is marked "Chester" on the map, is it not?

A. Yes.

Q. Now, if you will locate about where your ranch is [103] located? Just make a circle embracing it in general.

A. It is in the Marias River, and then went around and took in Willow Creek as part of it, the east border, and the north border, and turned there, along in there (indicating).

Q. Did it extend over into Toole County at all?

A. No.

Q. Now, wait a minute, will you write the words, "C. A. Kolstad" within that circle that you have marked?

(Witness does as requested.)

Q. About how many acres are embraced within this? A. About 5,200.

Q. You may take the seat. I didn't ask you where the Marias River was, but that is also shown on the map?

A. It is included in that circle.

(Testimony of Clarence A. Kolstad.)

Q. And is there also another creek or stream that we will be referring to in the testimony here?

A. Willow Creek, the one that runs in at the east end of it.

Q. That shows as coming from the north up there, and joining the Marias River on the map right on your place? A. Yes.

Q. Your lands then embraced bottoms in one or the other of those streams, Willow Creek or the Marias River? A. Both.

Q. Where about is the dam we referred to as the Tiber Dam? [104]

A. Oh, it is down about two or three miles. I forget what section that is, but I think it is right about here.

Q. You are pointing to a place there in what section, township and range?

A. Well, I don't know for sure. I think it is in Section 28 or 29.

Q. Township and range what?

A. Township 30 and Range 5.

Q. And when the dam was put in there and finally completed, it proceeded to serve to back up the water and form a reservoir as time went on?

A. Yes.

Q. When did that start, by the way?

A. In the fall of 1955.

Q. So that the land that is taken which is included within this reservoir, your land taken, follows along the Marias River and Willow Creek, is that right? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. This land you referred to now as yours is land that is in fact your own property, and you were the only one who had an interest in it?

A. Yes, I am.

Q. Clarence A. Kolstad land. I wish now, Mr. Kolstad, you would tell us what your knowledge is and your experience and acquaintance with the farm lands in the vicinity of your farm, and particularly, or more generally, we will put it, in [105] the neighborhood of Chester and around the neighborhood where your farm is located, what type of lands do you have there?

A. It is—in that area from the railroad track on south is an area covered by glacial drift, some 15 to 20 feet deep in places. There is no gravel outcroppings, and that is what makes the soil so highly productive. It is outstanding on soil maps. It shows the very area as far east as Cottonwood Creek—

Q. Where is Cottonwood Creek, would you locate it for us?

A. About 12 or 15 miles east of my place.

Q. It comes from the north, does it?

A. Yes.

Q. And runs south into Willow Creek, does it?

A. No, it is away east, it runs into the Marias River.

Q. It runs into the Marias River. Well, what kind of crops do they raise on this land in the vicinity you are describing to us?

A. We raise wheat mostly, some barley.

(Testimony of Clarence A. Kolstad.)

Q. What kind of wheat, particularly whether it is winter wheat or spring wheat?

A. We raise winter wheat mostly, sometimes we raise some spring.

Q. Is it land well adapted to the raising of winter wheat?

A. Yes, it is what we call the winter wheat area. It runs out when you get north of the railroad track and isn't nearly [106] as good.

Q. When you say it runs out, you mean it becomes land where you can't raise winter wheat?

A. No, winter wheat doesn't thrive on it like it does farther south.

Q. Well, is land that cannot raise winter wheat considered as valuable as land upon which you can raise winter wheat?

A. No, it isn't, because the production is less.

Q. Are there any other elements which enter into the consideration of value of land where you can only raise spring wheat? I am thinking particularly about the fact that this is arid country, generally so classed, and our rainfall is always a matter of uncertainty. What about spring wheat as compared with winter wheat?

A. Well, that is the reason winter wheat out-yields it. It ripens sooner and gets ahead of the hot weather and gets the most benefit of the June rains.

Q. So that if you don't get any moisture after the early spring, why, your spring wheat crop isn't going to do so well?

(Testimony of Clarence A. Kolstad.)

A. Well, it usually burns at the end where the winter wheat doesn't.

Q. The winter wheat ripens and is harvested sooner than the spring wheat?

A. Two to three weeks.

Q. Any things I have overlooked, not being a farmer myself, [107] where winter wheat has the advantage over spring wheat?

A. Certainly it does.

Q. I say, is there anything that you want to mention that I have overlooked calling your attention to?

A. Well, not only that it is higher in production, it gives you the advantage of getting in summer fallowing earlier. You seed it in the fall, and you don't have to seed wheat in the spring and you can summer fallow.

Q. Now, you mentioned something there that is probably pretty well known, but it should be testified to by you. In farming in this country, this arid country, you mentioned the words "summer fallowing." What is the accepted and proper way to farm for wheat?

A. Well, we just farm——

Q. I mean with reference to whether or not you crop it every year?

A. No, we crop it every other year, summer fallow one year half of the acres, and have half of the acres into crop.

Q. Where spring wheat is raised, is the same practice followed?

A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. Again they alternate each year and let the land lie fallow for the intervening year, do they?

A. Yes.

Q. So that you don't get any more crops from spring wheat [108] than you do from winter wheat?

A. No.

Q. And what you have told us about this land generally, does that pertain to your own land that you have identified here?

A. Yes, it does.

Q. How does your land class with the surrounding lands thereabouts in value and in productivity?

A. Well, it is about the same as the land around it. There is no difference, no variation.

Q. Can you give us an idea of how level it is, how rough it is, and how it lies?

A. Well, it is level wheat land, of course. If it wasn't, it couldn't be farmed. I have some good pictures of that land that shows the topography of it.

Q. Before I have these marked, Mr. Kolstad, I want to be sure I have the right pictures.

A. Yes, those are the pictures.

Q. Tell me whether or not those are pictures of your own farm?

A. Yes.

Mr. Wiggenhorn: Mark these respectively.

Q. I hand you what has been marked as Defendants' Exhibit 3 and Defendants' Exhibit 4, and will ask you whether or not those are photographs of portions of your farm? [109]

A. Yes, they are.

(Testimony of Clarence A. Kolstad.)

Q. Let's start with Defendants' Exhibit 3. Where was that picture taken and when?

A. They were both taken at the same place, you can see where they join together. It covers the entire area across for about three or four miles.

Q. So that we may understand what you mean, I see that Exhibit 3 shows a road going along the right hand side of the picture. Is that road also shown on Exhibit 4 on the left hand side of the picture?

A. Yes, the same road.

Q. What do these pictures respectively depict there with respect to your farm? What time of the year, you might tell us first, were they taken?

A. In the spring of the year.

Q. And was there any crop on the place where these pictures were taken, the land upon which these pictures were taken?

A. No, it shows the stubble from the year before, and it shows the summer fallow that was seeded.

Q. Now, let's identify this. On Exhibit 3, which you said is the one that shows the stubble from the crop taken off the year before?

A. Yes.

Q. And Exhibit 4 shows what?

A. It shows both stubble and summer [110] fallow.

Q. None of it shows any growing crop?

A. Well, no, it was too early in the spring.

Q. Do they, however, reflect the general contour of the country?

A. Well, that is what it does, show you the topography of the area.

(Testimony of Clarence A. Kolstad.)

Q. Are they pretty typical of the lands on your—wheat lands, let us call it, on your tract?

A. Why, yes, you can see a couple thousand acres of it in these two pictures.

Mr. Wiggenhorn: Offer Defendant's Exhibits 3 and 4 in evidence.

Mr. Galles: We will object on the ground there is no proper foundation laid.

The Court: In what respect do you want further foundation?

Mr. Galles: The time, the year when these were taken as well as just at what point on his property, and looking in what direction they were taken.

Mr. Wiggenhorn: Well, I think that is fair criticism.

Q. I think you did tell us they were taken in the spring? A. In the spring of 1956.

Q. Now, let's see if you can locate for us on the map about where they were taken?

A. Right about there (indicating).

Q. You are pointing to a place—let's identify it if you can [111] by section?

A. The road runs between Sections 8 and 9, and we were right on the road and took the picture facing north.

Q. There is one thing material we should know, Mr. Kolstad. This land that you show us here in the picture, does that show some of the land that was taken, or does it show some of the land remaining to you? A. Both.

Q. Maybe you can explain which is taken and

(Testimony of Clarence A. Kolstad.)

where the taken part lies, and where the remainder lies.

A. Well, it was taken——

Q. You are pointing at 3 now, are you not?

A. All right. It was taken right up to where that hill goes down, it was taken from there on north.

Q. You are not referring to the picture being taken, but you are referring to the land being taken?

A. The land was taken.

Q. Taken up to what point on Exhibit 3?

A. Right up to that hill, right down to the bottom of that hill.

Q. Maybe you had better put a pencil mark there if it can be done, a cross, let us say.

(Witness does as requested.)

Q. Well, maybe we will try it another way. Is it all right for the witness to stand here while he is testifying? [112]

The Court: Yes.

Q. Now, as I understand——

Mr. Galles: I would prefer it if they were out of the view of the jury until they are received in evidence.

Mr. Wiggenhorn: You are quite right about that.

Q. If I understand you correctly, what you have been telling us here is that the foreground of this picture is a part of the land that was taken?

A. Yes.

Q. And you have been trying to make a line across toward the background of the picture showing that in the background the land still remains to you?

(Testimony of Clarence A. Kolstad.)

A. Yes. Right where we took the picture is out of the take.

Q. Now, I think counsel would probably like to know somewhat better what direction the camera was pointed when that picture was taken?

A. We were facing north.

Q. Were you present, by the way, when the picture was taken? A. Yes, I was.

Q. Who took the picture?

A. Mr. Kraut from Shelby.

Q. A professional photographer you employed for the purpose? A. Yes, I did. [113]

Q. You took him out there—— A. Yes.

Q. ——and told him where to take the picture?

A. Well, we decided between ourselves where to get a good picture. You can't take pictures every place to get a full background, so we took them wherever we both decided would make the best picture.

Q. Do I understand that you said the pictures, that you are looking toward the north in that picture? A. Yes.

Q. And the point you marked there on the map is probably not quite, doesn't mean too much to us unless we know how it is located with reference to either the Marias River or Willow Creek.

A. Well, it is between them. It is north of the Marias River, and you can see Willow Creek in the background of these pictures.

Q. And were the pictures taken on the bottoms of the Marias River or Willow Creek or up on the

(Testimony of Clarence A. Kolstad.)

bench? A. Up on the bench.

Mr. Wiggenhorn: That is about the best I can identify them. I will renew the offer.

Mr. Galles: I will object because it is remote in point of time. It is a year after the date of taking.

The Court: Overruled. Does the land depicted here, does [114] that indicate the condition of the land at or about the same time—what is the date of taking here?

Mr. Galles: May 24, 1955.

The Court: In May of 1955?

A. Yes. All I intended to do is show the topography, and it hasn't changed any, I don't think.

The Court: The objection is overruled, and the exhibits are admitted.

(Defendants' Exhibits 3 and 4, being the photographs above referred to, were here received in evidence.)

Mr. Wiggenhorn: May I pass them to the jury?

The Court: Yes.

Q. You spoke somewhat of the depth of the soil of this region, and your land particularly. Is that soil unusually deep as lands in Montana generally go?

A. Yes. It is true, though, on down through the Triangle.

Q. Now, you refer to the Triangle. Now, what is generally understood by the Triangle?

A. Why, it is the triangle made by the Great Northern Railroad. It has three corners bounded by Havre, Shelby and Great Falls.

(Testimony of Clarence A. Kolstad.)

Q. Those are the three corners comprising the Triangle? A. Yes.

Q. You take a line drawn from one town to the other, and we have the Triangle you refer to? [115]

Q. You are located about where in the Triangle?

A. Oh, in about the north central, or a little to the westly side of it. The top is on the north side.

Q. How many miles to the base of the top from your ranch? A. The base of the top?

Q. Well, we will consider it the base, anyway. I will accept your correction on it.

A. About 105 miles from Shelby to Havre.

Q. Well, I didn't mean that. I knew I wasn't using the right terminology. We have a triangle here standing on its point, so far as considering the north as the top, is that right?

A. That's right.

Q. Great Falls is the lower part, the lower point of the triangle? A. Yes.

Q. Then, the base is to the north, isn't it?

A. Yes.

Q. Now, how far are you from that line that forms the north base, we will call it?

A. Oh, about seven or eight miles.

Q. How does your land compare with other lands in the Triangle?

A. It is as good as any of it unless it would be down around the Dutton area. They have a little more wheat per [116] acre per year, but they don't raise as good a quality wheat, they don't raise as much protein.

(Testimony of Clarence A. Kolstad.)

Q. You didn't say anything about the quality of wheat you generally raise on your lands there. What about it? What particularly is the nature of the special value in that respect?

A. High protein. It is only raised in the State of Montana. In the whole United States, the State of Montana is the only one that produces high protein, and we are right in the heart of it.

Q. And with respect to Montana lands, this land of yours, is that still outstanding, do I understand?

A. Well, we raise, I think we raise more protein on the average than the higher producing areas, probably not any more than some of the lower producing spring wheat areas, but they lose out on production.

Q. And that extra protein, of course, commands a higher price? A. We get a premium for it.

Q. Give us some idea about how much premium you have been getting in recent years over the base price?

A. Well, I think right today the market is 47 cents for 17 protein.

Q. Well, now, 17 protein doesn't mean a thing to me unless you tell me what protein you get on your yields. [117]

A. Well, it averages 15, 16 protein.

Q. And do I understand—well, for 15 or 16 protein, what would today's market show, if you know?

Mr. Galles: I object to that as immaterial, today's market.

(Testimony of Clarence A. Kolstad.)

Q. Well, we don't need to be precise about it, let's say over the last few years. I want to know what added advantage high protein brings in the way of market price?

A. I would just say roughly between 25 and 35 cents on an average over the years.

Q. Over the base price? A. Yes.

Q. I don't think you have told us how land in the Triangle generally compares with other Montana wheat lands?

A. Well, I think it is the tops of the whole state in the way of production, and also in protein.

Q. Is that what you think, or is that generally so understood by reputation?

A. Yes, it is, according to the averages handed out by county allotment offices and so on, the figures you can get ahold of.

Q. Has anything transpired through the years with respect to this land in the Triangle as to its production and the capabilities in that respect, and as to its reputation and the value that has been attached to it? [118]

A. Well, yes, any land that is a high producing land always has a value. I don't know just what you——

Q. Well, I am talking of values. I want to know whether in the last years, in the last dozen years, let us say, roughly, it has been come to be understood generally that the value of this land has gone up or down in the Triangle?

A. It has gone up considerably.

(Testimony of Clarence A. Kolstad.)

Q. What has become apparent in the production from these lands in the Triangle?

A. Well, it has been consistent. We don't have a crop failure, we always raise wheat and we always have a good average every year.

Q. For how many years has that prevailed?

A. Well, for the last 15 years.

Q. I understand that this land of yours, as well as the other land in the Triangle is predominantly recognized as wheat land?

A. Yes, it is.

Q. And winter wheat land as you have told us?

A. Yes.

Q. Has the fact that you haven't had crop failures on this land in later years reflected itself in prices at which the lands have sold?

A. Well, lands haven't been selling much because they are just too good. People keep it. [119]

Q. Well, such sales as there have been, have they been at higher prices?

A. They are away up from what they used to be 15 or 20 years ago.

Q. Going back five years, have they gone up?

A. Oh, yes, a lot.

Q. And let's go back another five years, have they gone up over that five years, too?

A. They have been consistently going up since in the early thirties.

Q. You are referring now to the Triangle area?

A. Yes, I am.

Q. Including your own lands?

A. Yes, I am.

(Testimony of Clarence A. Kolstad.)

Q. About what has been your average production per acre of seeded land on your ranch over the last 10 years, let us say?

A. Well, I wouldn't go back quite 10 years because I haven't enough records, but I would say in the last seven or eight years, I have averaged 22 bushels on seeded acres.

Q. Now, you said over the last seven or eight years, and that is based upon—you mentioned the word "records," is that actually based upon records that you have kept? A. Yes.

Q. And when you speak of records, what records are you [120] referring to?

A. My farm records that I keep for income tax purposes showing the sales, and, of course, the record of the seeded acres can be gotten out of the allotment office.

Q. Now, this average of 22 bushels per acre, and that is seeded acres—— A. Yes.

Q. Does that take into account lean years when production wasn't so good and fat years?

A. It is an average of the years.

Q. And to be fair about it then, so that the jury will understand it, that 22 bushels per acre average, would mean that one-half of that amount, or 11 bushels per cultivated acre would be the average, is that right? A. That's right.

Q. Now, have modern farming methods had anything to do with the consistency with which you have been able to raise crops on your farm, and elsewhere in this vicinity?

(Testimony of Clarence A. Kolstad.)

A. Well, certainly, and it has also helped to build up our averages because we can get the work done on time. All our summer fallow is always good whereas it used to be we didn't have enough power to get the job done on time.

Q. And what, in your opinion from your expertness and knowledge of farming, is it that is the secret of that success in wheat farming on arid land for winter wheat with the land or half of it lying fallow each alternate year? [121]

A. Well, the secret is the size of the place, if it is large enough to operate efficiently, why, you make more net profit from it.

Q. And what type of outfit do you find from experience is needed as to size and power and so on for operating such a place successfully?

A. Diesel crawlers.

Mr. Galles: I will object to that as immaterial.

The Court: Overruled.

A. We use Diesel crawlers for the most efficient operation.

Q. Give us an idea of what size unit that would be that you recommend and use?

A. Well, you would buy your crawler to fit your size of unit; you would want your horsepower to fit the size of the acreage.

Q. With respect to an economic unit—you referred to sufficient size. What size unit, I might ask you, would you consider a minimum to efficiently operate?

A. Not less than 2,500 acres, 3,000.

(Testimony of Clarence A. Kolstad.)

Q. You mean 2,500 acres of cultivated land?

A. Cultivated land.

Q. And then again will you tell me what 2,500 acres would be, about four sections of land?

A. Something like that.

Q. And as I understand it, that doesn't just mean the entire [122] acreage that one would own, but it is cultivated acres out of that?

A. That's right.

Q. And then what kind of an outfit should properly be used, that is, Diesel crawler that you talked about, how big should it be?

A. Oh, probably about an 80-horse crawler.

Q. In other words, it has got to be a big, powerful outfit?

A. Certainly.

Q. What type of plows and other—cultivators and so on, what size—I am afraid I don't know your technical term. What do you call it? What width of outfit do you pull behind that in the way of cultivators and plows and so on?

A. That would depend upon what you were doing; there is duck foots or rod weeders.

Q. Well, maybe I am rambling away a bit, Mr. Kolstad. I am trying to find out from you—maybe you can tell us in your own words. In the most efficient farming methods to yield the highest profits from such a unit as you have described, what is required in the way of getting the work done with promptness?

Mr. Galles: Object to that as being immaterial. The profits are not an issue in this case. I am going

(Testimony of Clarence A. Kolstad.)

to attempt to keep the testimony confined to land values.

Mr. Wiggernhorn: I am quite agreed with counsel, but I [123] think it is quite material, your Honor, along the lines I was just pursuing here to try to demonstrate that these lands have increased in value because of these discoveries.

The Court: For that purpose, you may proceed.

Q. Do you have the question in mind?

A. No, I lost it.

Mr. Wiggernhorn: I have lost it, too. I wonder if you would read it, Mr. Reporter.

(Question read back by Reporter.)

Q. How do you go about it, teach me how to farm that kind of unit, if you will, please.

A. Well, it depends upon your unit. You have to fit the equipment, the size of your equipment to the size of your unit. It can be from 2,500 on up to 5,000 acres, any amount of acres, but it has to be at least 2,500 in my estimation to be an economic unit, or an efficient economic unit.

Q. Go ahead.

A. And if you are going to—if it is a one-man operation—by that I mean if it is a one-power unit operation, one Diesel will handle any amount of it up to four or five thousand acres, if you get a big enough Diesel, but you should fit the acreage with the right size Diesel, in order to be efficient, and, of course, when you get your power unit, you will

(Testimony of Clarence A. Kolstad.)

fit the rest of your equipment to it, whatever it will pull. [124]

Q. Well, what I am driving at, Mr. Kolstad, I want to find out what the secret is of recent years that has made it apparent that these lands in your district there, your lands included, have reached a higher value. What is the secret of farming that has brought that about, if there is one?

A. It is power farming.

Q. Which, as I understand it, means and entails and necessarily requires that there be less manpower and more machine power used?

A. That is what it amounts to, that is where the savings comes.

Q. And does that power farming, as you call it, also bear upon the time element that is important, is it, in farming this type of an operation to get your various jobs done quickly in summer fallowing and working the ground?

A. That is the secret of the whole thing, to get it done on time.

Q. Have you, yourself, in farming—I'll withdraw that. Now, over the years in the past, we will say prior to 15 or 20 years ago, do I understand in this same Triangle country there have been crop failures when the landowners have actually lost, when they haven't even made their seed, so to speak?

A. That has been a long time ago. [125]

Q. How about recent years, has it always been profitable in the last 10 or 15 years?

(Testimony of Clarence A. Kolstad.)

A. Certainly it has.

Q. Has that been due entirely to nature and rainfall, or is it due to the methods you have been telling us about?

A. It has been due to modern farming, modern practices because the rainfall hasn't varied very much over the last, I guess, 20 or 30 years.

Q. So I understand from you, then, that modern farming methods, that with them, power farming and so on, the risk has pretty much been taken out of farming in this district that you are talking about?

A. Well, if history means anything, it has certainly been taken out.

Q. How is that?

A. If history means anything, we have taken it out.

Q. And that, of course, refers to winter wheat. There is always some risk in spring wheat, is there?

A. There is more risk than there is in winter wheat.

Mr. Wiggenhorn: I was going to embark on questions of value, and I am wondering if you are planning on a recess this morning?

The Court: Yes, do you think this is the proper time?

Mr. Wiggenhorn: It might be.

(Jury admonished—10 minute recess.) [126]

Q. Mr. Kolstad, from your knowledge, and your long life span lived in this vicinity where your

(Testimony of Clarence A. Kolstad.)

ranch is located, do you profess to know the fair market value of the lands in that vicinity at the time of the taking on May 24, 1955?

A. Yes, I do.

Q. And as a long-time resident here, have you been familiar with such sales as have taken place in the vicinity?

A. Yes, I am familiar with most of them, I think.

Q. Do you think you have knowledge, then, as well as anybody does?

A. Well, yes, I have been interested in following them.

Q. You have been interested in following them and have kept your ear to the ground?

A. Yes, I have.

Q. At how high a price have any lands sold at?

A. \$135 to—I think around \$135, right in there close.

Q. When we speak of that price, are you referring to the price for cultivated land?

A. Oh, yes, that is for wheat land.

Q. That wouldn't be across the board?

A. No.

Q. Now, from your own knowledge of such sales as have taken place, from your knowledge of what lands of this sort produce, and the reasonable expectations the owner can have of profits, and from all your experience, what is your opinion, as [127] well as by way of being owner of this land, what is your opinion or your estimate of the fair market

(Testimony of Clarence A. Kolstad.)

value of the lands that were taken by the government in this case on May 24, 1955?

Mr. Galles: Object to that as improper, your Honor. It is not the test, the value of the lands taken, under the before and after rule.

The Court: Sustained.

Mr. Wiggenhorn: I was not paying too much attention. May I inquire——

The Court: The question is what was the fair market value of the lands before the taking, and what was the fair market value of the lands after the taking.

Mr. Wiggenhorn: I realize that now. I did ask the wrong question. I will withdraw the question.

Q. Instead of that, Mr. Kolstad, I will ask you what is the fair market value of your entire farm, which I think you said comprised about 5,200 acres, with relation to the same concept that I have mentioned in my other question?

A. I forget just what I had.

Q. Well, do you have some notes in your pocket?

A. Yes, I have, because I broke it down.

Q. Before we break it down—we will do that momentarily—I want to have you give us first the value of the entire unit.

A. The value of the entire unit is around [128] \$452,000.

Q. That was at the time, or immediately before the time of taking? A. In 1955.

Q. And I think you told us there were approxi-

(Testimony of Clarence A. Kolstad.)

mately 5,200 acres. Do you have there on your memorandum the exact acreage?

A. 5,180 acres, point seven.

Q. 5,180.7 acres. Now, I direct your attention to the exhibit now on the board before the jury marked defendant's Exhibit No. 5, and I will ask you generally what it pretends to depict?

A. That is the entire acreage, the 5,180 acres.

Q. Embraced in various colors?

A. Well, that is according to classifications.

Q. Now, have you classified your lands?

A. Yes, I have.

Q. And will you identify the colors that you have marked them here on this exhibit as to what they represent in the way of classification?

Mr. Galles: I'll object to testimony with reference to the exhibit until proper foundation is laid.

Q. Will you tell us how this exhibit was made up, and from what information it was made up?

A. I classified the land by going over it, measuring it, and then I used girls in the allotment office with a planimeter on aerial photographs to measure various land as to [129] agricultural and grazing and so on. Then, from those maps that I colored out, I had this map made, transcribed from it into an overlay map.

Q. And the classifications that you have used, were they tillable, bottom land, grazing land, plowed land, and breaking, as they have been identified here?

A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And by breaking, you mean land that has been broken, but not yet cropped?

A. That was made in 1955, and at that time, it was new ground. It has been cropped now since then.

Q. Since the time of taking?

A. Part of it.

Q. You are trying to represent here the land as it existed at the time of taking, duly classified?

A. In 1955, yes.

Q. In these classifications that you made, they were based upon careful study on your part, and from your familiarity with the ground?

A. I have been over every bit of it.

Q. And you say you also consulted the soil conservation office and the allotment office?

A. It was made from my own study, and then verified by the aerial maps in the Assessor's office.

Q. And the exhibit as we find it here now, then, is as you [130] prepared it, only it was put on this form, but otherwise, it is exactly as you yourself prepared it.

A. Yes.

Mr. Wiggenhorn: Do you want to renew any further objection?

Mr. Galles: I wonder if I might inquire of the witness who made what is marked as Exhibit 5, Mr. Kolstad?

A. I had it made in Portland.

Mr. Galles: You didn't make it yourself?

A. No.

Mr. Galles: Have you looked at it and know it is

(Testimony of Clarence A. Kolstad.)

accurate as far as the description of the land owned by you is concerned?

A. I have checked it back against my own map that he used to make this with.

Mr. Galles: And what about the cross-hatching on the map, what is that?

A. That is the lake.

Mr. Galles: Is that the lake as it exists now?

A. Well, that's too rough to be accurate. We kind of roughed it in to get an idea, but it is on the, oh, probably on the 2980 line, I guess, or——

Mr. Galles: 2980 is the elevation mark?

A. Yes, either 2980 or 2992, I forget which we used, but it really doesn't make any difference. All we were trying to [131] do is show that the water was in between this land. As far as the accuracy of the water line, I won't back that up.

Mr. Galles: You are not representing the accuracy of that?

A. No, because the water won't be on anything that isn't taken, and it will be on everything that is taken, so that is all we cared about on that.

Mr. Galles: Well, it won't be on everything that is taken, you didn't mean that?

A. No. I mean by that there won't be any water showing on what hasn't been taken.

Mr. Galles: I think that is satisfactory.

Q. (By Mr. Wiggernhorn): It is safe to say this, then, that with reference to your own lands, the lake as depicted there, or reservoir as depicted there, is correct with reference to your land?

(Testimony of Clarence A. Kolstad.)

A. That's right.

Q. Well, now, then, will you proceed to identify on the map, on the Exhibit 5, the various classifications that you have thus broken this land into, your lands into, starting with the first one, the red? I think you will find the legend on the map which helps to identify it. There is a pointer here, by the way, if you prefer to use it.

A. Well, the first one—do you want to call it red today? You called it purple yesterday. [132]

Q. It looks red to me today.

A. Anyway, the first one is tillable.

Q. That is red?

A. All right, we will call it red today. You will find it in all the various places where it is. The next one is bottom land——

Q. That is blue?

A. The blue one is bottom land. It is only along the river and a little bit along the creek. Then, the green one is grazing, which is shown in the various places where it is. The plowed land is in the black, and that is the land that was in the pictures that you saw. The pictures were taken along right about here (indicating) and showed this land all the way in through here (indicating). And then the breaking, that is in the yellow, and most of it is under water now, but some of it was cropped in '56.

Q. Now, the only difference, as I understand you, between what has been identified there in the yellow as breaking and what is identified in the

(Testimony of Clarence A. Kolstad.)

black is plowed land, is that the yellow is also broken land, is also plowed land, is it not?

A. Yes, it's the same kind of land, only it was new land. Back here when this map was first made was in '55, and I wanted to segregate it from the other, mostly for my own benefit so I would know which was which. [133]

Q. In other words, that yellow, while broken the same as the black, it had not, at that time, in 1955, in May, 1955, yet been cropped? No crop had been taken off of it?

A. No, it was in summer fallow. It really had been broken in '54 and was in summer fallow in '55.

Q. Otherwise, it classes the same as the black?

The Court: Pardon me, may I ask a question. You have referred to red on the map. There seems to be different shades of that color. Do you refer to them all as red?

Mr. Wiggenhorn: I'll answer, if I may. I will refer to them all as red, yes. There is not supposed to be any distinction. Is that right, Mr. Kolstad?

A. That's right, yes. I think maybe the way the light hits there is the reason.

Mr. Wiggenhorn: Yes. Some of them are almost pink.

The Court: Well, yes, but all of these, this and this (indicating) are the same color, are they, you refer to them all as red?

A. Yes.

The Court: Very well.

(Testimony of Clarence A. Kolstad.)

Q. (By Mr. Wiggenhorn): Now, does that map likewise show the Marias River?

A. Yes, it is described on there.

Q. And does it show Willow Creek?

A. That is Willow Creek going up here. [134]

Q. You are pointing to it?

A. Well, this is the line (indicating) that is supposed to be the bottom.

Q. Your ranch, then, lies upon both Willow Creek and the Marias River, or did lie upon both Willow Creek and the Marias River? A. Yes.

Q. And the crosshatching, as counsel has mentioned, represents approximately about the area of the reservoir, at least when it is finally filled?

A. Yes, at a certain level. That is roughly the size of the lake.

Q. All right. You may resume the stand.

A. All right.

Mr. Wiggenhorn: Now, for assisting the witness in his breaking down these classifications and identifying acreages, will you mark this for identification? You have a copy of this, counsel?

Mr. Galles: Your Honor, if we might have a few minutes. I have objected to one portion of the form of the exhibit that counsel is marking.

The Court: Very well.

Q. I hand you what has been marked for identification as Defendants' Exhibit 6. Is that a tabulation which we refer to in a moment in your testimony of the breakdown or classification [135] with respect to acreages and values that you are about to

(Testimony of Clarence A. Kolstad.)

testify concerning here? A. Yes, it is.

Q. Well, referring to that exhibit, then, it shows at the top that the total acreage in your entire lands before the taking was 5,180.7 acres, as you have testified to a moment ago, is that true?

A. Yes.

Q. And now, then, there follows the breakdown of that acreage of the land that you owned before the taking, and will you tell us, now, then, how many acres of plowed ground there were at that time, as you classed them?

A. 2,551.30 acres of plowed ground.

Q. How many acres of tillable ground?

A. 834.20.

Q. Now, let's go back a moment to this plowed ground. That included then both the black and the yellow as shown on Defendants' Exhibit 5?

A. Yes.

Q. And your next classification is the grazing land. How many acres of grazing land were there at that time in your lands? A. 1,191.69.

Q. And how many acres of bottom land?

A. 603.41. [136]

Q. We might inquire about this bottom land. What was the character generally of that bottom land?

A. It was open river bottom, but it was undeveloped except that we used some of it to cut wild hay on.

Q. What was it suitable for, its highest and best use, put it that way?

(Testimony of Clarence A. Kolstad.)

A. What we didn't cut hay on was ideal for winter grazing.

Q. Whatever you may have used it for is probably not so important. What would it be suitable for?

A. Well, the largest part of it could have been developed into alfalfa meadows.

Q. Was it also suitable for feeding cattle in the winter time or running cattle in the winter time?

A. Oh, yes, yes.

Q. The grazing land, give us an idea of how good or bad it was, that which you classified as grazing land on your place?

A. Well, it was average grazing that you find along the Marias River. Some of it was breaks, and some of it was in the lower land, some of it was up on top on the bench.

Q. Now, then, getting back again to the plowed land that includes both the cultivated and the yellow there, the plowed or breaking, what value do you put upon it as of the time of taking per acre?

A. \$125 an acre. [137]

Q. And you have carried that out, have you, by multiplication in Exhibit 6 which you have before you into what figure? A. Into \$318,922.50.

Q. And then your 834 and a fraction acres of tillable land, what value did you put on that at the time of taking? A. \$95.

Q. And that amounted to how much?

A. \$79,249.

(Testimony of Clarence A. Kolstad.)

Q. Then, the grazing land, 1,191 and a fraction acres, what value did you put on that?

A. \$20. That made it \$23,833.80.

Q. And the bottom land, 603 acres, what did you value that at? A. \$50. That is \$30,171.50.

Q. Comparing that with the \$20 value you put on the grazing land, you figured, then, that those bottoms, with the possible uses of it, and the actual use you put it to yourself, justified that much higher value, did you?

A. Why, yes, it is conservative.

Q. Was there water there for the irrigation of those bottoms had you seen fit to do it?

A. Yes, the Marias River ran right through them.

Q. And how about Willow Creek where you find bottoms along Willow Creek?

A. It had water in it for the first half of the year, [138] usually until around the 4th of July.

Q. Any sub-irrigation there in those bottoms?

A. Yes.

Q. You mentioned something about cutting wild hay sometime?

A. Well, it is partly sub-irrigation, and if the rainfall came at the right time, it would make good hay.

Q. Now, the total of all of those figures you have given us there and that is shown upon this exhibit is how much? A. \$452,176.80.

Q. And when you testified here a moment ago to a value of \$450,000 as your opinion of the fair

(Testimony of Clarence A. Kolstad.)

market value of your land before the taking, you just made that a rough figure and dropped the extra \$2,100, did you? A. Yes.

Q. And did you also figure out what the price per acre would be for the total of \$5,180 acres you then had before the taking, across the board?

A. Yes, I worked it out. It would amount to \$87 per acre.

Q. Well, now, then, let's take a look at the land after the taking. This Exhibit 5 that we have here on the board, as you have told us, is the way your land looked, classified as you have classified it, before the taking? A. Yes.

Q. And I will pull off this first transparency, and will ask you what is now shown on the same exhibit with respect [139] to the colored portion of it? A. That's what's left.

Q. So that when I slipped off this first transparency here, or overlay, I was just taking off, was I not, the land that was in fact taken?

A. That's right.

Q. And if you put it back on here again, and hold it off, why, this first overlay on the exhibit represents the land that was actually taken?

A. Yes, it does.

Q. So, when we take it in the manner in which I am doing it right now, we have left the land that remained to you after the taking? A. Yes.

Q. And you can see here, can you not, by the crosshatching, how the lake or reservoir lies with respect to those lands taken? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And before we go into the value of the remaining land after taking, will you point out any significant things to the jury about the parcels of land that are there left, with respect to the reservoir, particularly?

A. Well, I am out of the farming business.

Q. Do you mean that literally or figuratively?

A. This is all I got left, this part is cut away, this is [140] all water, all of this part is water (indicating).

Q. The crosshatching?

A. Yes, so that this part is left over here (indicating)——

Q. Now, wait a minute, when you say “this part,” you are pointing to what?

A. This 80 acres.

Q. Those are 80 acres of what?

A. Tillable land, mostly tillable land.

Q. Let's take a look at those 80 acres for a moment. How would it be possible for you to farm those 80 acres in conjunction with what remains to the north of the lake or reservoir?

A. It would be possible by traveling about 50 miles.

Q. And why do you say that?

A. That is the only way to get there.

Q. That is to say the lake now stands between your 80 acres and the remainder of the land?

A. That's right.

Q. And you have to go around by road to get on there?

(Testimony of Clarence A. Kolstad.)

A. That's right, you have to go to the dam, cross it and then come around to Highway No. 2 and come down again.

Q. Will you tell us whether or not the 80 acres could be farmed in conjunction with the balance, or whether it now becomes a separate unit, or a separate 80 acres?

A. Well, it couldn't be farmed. That would be ridiculous to [141] drive 50 miles to farm 80 acres.

Q. As a matter of fact, is it feasible or possible or economical as the matter now stands, as you find yourself with respect to that 80 acres, to farm it at all? A. No.

Q. What remains, what value is in it?

A. All the value it has is what you might be able to sell it to somebody else for.

Q. And a small unit of that sort, 80 acres, can that be farmed by an individual unless he joined it up with other lands he has to make an economic unit?

A. It would have to be somebody that would have land adjoining it that would buy it.

Q. Well, now, let's take a look at the land that lies north of the reservoir. What have you to say about that as to whether or not there is sufficient land there, cultivated land or tillable, to make up an economic unit?

A. It is not an economic unit.

Q. What? A. It is not an economic unit.

Q. Now, will you refer again to your Exhibit 6, I believe it is. Does that also show the breakdown

(Testimony of Clarence A. Kolstad.)

of the classification of the lands remaining that are now shown on Exhibit 5 that you have just testified to? A. Yes, it does. [142]

Q. How many acres of plowed ground?

A. There is 807.5 acres left.

Q. And how many acres of tillable?

A. 379.80.

Q. Let's pause there for a moment. That makes for the two of them 1,180 some acres?

A. 1,187.30.

Q. In your opinion, is that an economic unit that could be farmed successfully? A. No, it isn't.

Q. Does the value of that smaller unit as small as this one is deteriorate or go down then from the value you have placed of \$125 for your plowed ground before the taking?

A. Yes, it does, in my way of thinking.

Q. Well, all right, what value did you put on that 807 and a half acres of plowed ground after the taking, considering the amount that was left to you there? A. A value of \$100 per acre.

Q. And did you cut that value down from the \$125 you had before the taking because it was a smaller unit, or was there anything else involved in it?

A. Well, because it was a smaller unit, it ceased to be an economic unit.

Q. Did you also take into consideration that 80 acres of it was south of the lake, and not available to you for farming? [143]

A. You are not on tillable ground now.

(Testimony of Clarence A. Kolstad.)

Q. That's right, that's tillable, that is not in the plowed classification, is that right? A. Yes.

Q. Well, then, let's take a look at the tillable then. You had that valued at \$95 before the take, what is your value then after the take?

A. \$80.

Q. You dropped it \$15 an acre, did you?

A. Yes.

Q. What entered into your calculations in making that drop?

A. Well, there isn't enough of it left, and then that 80 acres across the river had no value at all in reality, only what you could get for it.

Q. So, then, you have got a differential of \$25 of the value of your large unit as you originally had it for plowed ground, you have got a difference of \$25 an acre in the value of that before the take and after the take? A. Yes.

Q. And with respect to the tillable, you again have dropped down only \$15 from the value before the take and the value after taking, right?

A. That's right.

Q. Now, let's take a look at the grazing land.

What did [144] you value that grazing land at before the taking, \$20 an acre? A. \$20 an acre.

Q. And after the taking, what did you value it at? A. \$5.

Q. How many acres did you have left?

A. 212 acres point 70.

Q. That is shown in the green on that map, and we see just where it is located, do we not?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Q. Various patches. And will you tell us as a farmer and a man who knows about stock raising, tell us whether or not those small patches of grazing land have any appreciable value left?

A. No, they are not large enough to operate cattle on.

Q. So that you feel that the \$5 value would be right, or would it be a fair value to put on it?

A. It is the fair value. All those are for is just to tie your land together. It is not any good any more.

Q. One thing else about this grazing, can you get to water with your stock if stock were to be run on that grazing land, could they reach water?

A. No.

Q. They could before, could they not?

A. Yes, they had the Marias River. [145]

Q. You didn't tell us before, but without putting that overlay back on there, was your grazing land readily available to water?

A. Yes, the river was running, and the creek had water in it at all times.

Q. It was ideal for cattle so they could reach water at any time?

A. On both sides.

Q. And that condition no longer exists?

A. No, it doesn't.

Q. You are now completely shut off from water on your grazing?

A. That's right.

Q. And what about the bottom lands, you lost all of that?

A. I lost all of that.

(Testimony of Clarence A. Kolstad.)

Q. You had that valued at \$50, and, of course, you haven't any left? A. That's right.

Q. And with respect to the ranch as a whole, was that bottom land, from the standpoint of an interested buyer, in connection with the farming and the highest and best use available, would that bottom land in itself be attractive and a feature that would enhance the value of your entire ranch?

A. Why, certainly. You have to have water in order to have a cattle ranch. [146]

Q. And likewise, did these bottoms afford shelter for cattle?

A. Some of them had trees on and brush, and some of them were plain.

Q. Could you raise alfalfa on the bottoms also, was it possible to?

A. A lot of them were already level, and it could be completed.

Q. That is all gone now?

A. It is under the water.

Q. The pieces of land that you have left that are shown there on the exhibit before the jury now, it is just what you have left, and you have got no bottoms, and you have just those pieces of land?

A. That is all.

Q. And just as a matter of interest, Mr. Kolstad, you had 5,180 acres before the taking. How many acres do you have left after the taking?

A. 1,400.

Q. That included everything, did it?

A. Yes, that is all the acres that are on that map.

(Testimony of Clarence A. Kolstad.)

Q. And the value that you have placed upon it as you have broken it down into classifications amounts to how much per acre value there?

A. Across the board? [147]

Q. Yes. A. \$80.

Q. Now, as I remember your testimony, you testified a moment ago that the price you put on the land before the take, all those classifications added together amounted to \$87 per acre, and after the take, the 1,400 acres, the price that you put on it amounts to \$80? A. That's right.

Q. You dropped \$7 an acre as the net result of your valuations, is that correct? A. That is it.

Q. Probably I neglected one thing, Mr. Kolstad. In referring to the 1,400 acres after the take, you gave us the various numbers of acres in each instance of the three classifications remaining, plowed, tillable and grazing. Carrying out the value of \$100 an acre for the 807 and a fraction acres, how much does that amount to? A. \$80,750.

Q. And 307.80 acres at \$80 amounts to how much? A. \$30,384.

Q. And the 212.70 acres of grazing at \$5 amounts to how much? A. \$1,063.50.

Q. And the total amounts to how much?

A. \$112,197.50. [148]

Q. And I believe when you testified a moment ago, you valued the 1,400 acres at an even \$112,000?

A. Yes.

Q. As against the value you put on it before the taking of \$452,000? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And does Exhibit 6 also show the difference between the \$452,000 before the taking, and the value after the taking of \$112,197, does it show the difference there? A. Yes; \$339,979.30.

Q. Now, then, is that the amount you claim you were damaged in this case and that your loss that you have suffered amounts to? A. Yes.

Q. The difference between the two figures?

A. That is it.

Q. The difference between the value before the taking and the value of the land remaining after the taking? A. Yes.

Q. I believe by the process of subtracting, we would find that deducting 1,400 acres from 5,180.7 acres, we would find out the amount of land taken. That would be 3,780 acres, wouldn't it, approximately? A. Yes.

Q. Did you also figure out, then, on the basis of the difference [149] in value before the take and after the take, how much that 3,780 acres would amount to per acre across the board?

A. It amounts to \$87 per acre across the board, making a total of \$327,860.

Mr. Wiggenhorn: We now offer in evidence Plaintiff's, or Defendants' Exhibit 5. That is the map.

Mr. Galles: Pardon.

Mr. Wiggenhorn: Defendants' Exhibit 5, I think, is the map.

Mr. Galles: I would like to have an opportunity to check the accuracy of the land as colored with

(Testimony of Clarence A. Kolstad.)

my information before determining whether I have an objection to it or not on that basis.

The Court: Well, what difference would that make whether you agree with it or not?

Mr. Wiggenhorn: It might make a difference in his objection.

The Court: That is, if he has laid the foundation for its admission, it is admitted whether you can show it is inaccurate or not.

Mr. Galles: Very well; I will withdraw my objection.

The Court: Very well; it is admitted.

(Defendants' Exhibit 5, being the map above referred to, was here received in evidence.) [150]

Mr. Wiggenhorn: We likewise offer Defendants' Exhibit 6. You have a copy of this, counsel?

Mr. Galles: Yes. Your Honor, in pretrial, we agreed that there should be a summary of values for each expert, and on that basis, I will agree it may be received.

The Court: Very well; it is admitted.

(Defendants' Exhibit 6, being the summary above referred to, was here received in evidence.)

Mr. Wiggenhorn: I think I neglected also to offer in evidence the map which was Defendants' Exhibit 2. I have even lost track of it.

The Court: That is the map of Liberty County?

Mr. Galles: No objection.

(Testimony of Clarence A. Kolstad.)

The Court: Very well; it is admitted.

(Defendants' Exhibit 2, being the map above referred to, was here received in evidence.)

Q. Have you kept some records, Mr. Kolstad, over the past half dozen years of your costs of operation? A. Yes.

Q. And those records have likewise been reflected in your income tax returns, and you have them available, do you? A. Yes.

Q. Tell us about how much it has cost you over the last half a dozen years per acre for your farming operation, your wheat farming operation, having in mind every element entering [151] into cost such as depreciation, taxes, and everything else that could properly be charged to cost?

Mr. Galles: I will object to that question unless it can be shown his records are confined to the land involved in his particular ownership.

The Court: Yes; I think you have to lay a foundation for the records on this properly.

Mr. Wiggenhorn: I wasn't going to offer the records themselves unless counsel wanted to see them. I merely proposed to have the witness testify to what the general cost of operating these lands of his has been.

The Court: You will have to show you are asking him to do that from records. You will have to establish he has records covering these lands.

Mr. Wiggenhorn: Does your Honor mean that

(Testimony of Clarence A. Kolstad.)

the records would be the best evidence, that he can't testify orally? I was going to have him testify orally, to tell the truth, because I understood the question was raised before in another trial.

The Court: I'll discuss it with you out of the presence of the jury.

(Jury admonished.)

(Jury withdraws from Courtroom.)

Mr. Galles: Your Honor, I understand just from conversation with counsel that their records are based upon the production not only of the lands this witness testified to, but [152] lands owned by Mrs. Kolstad and lands owned by them jointly, and possibly other lands. Unless they can lay the foundation that the records are confined to the operation of this land and not the operation of other land, I think we must object to it as being immaterial. It gets into the basis of the appraisal of the operation rather than the land.

The Court: That is as I understand the situation.

Mr. Wiggenhorn. You couldn't possibly pick out of the records the exact cost of operating this land. We know it to be true and counsel knows it, and the court is aware of it, too, that the witness not only farmed this land, but likewise farmed two other tracts. Of course, the records are elaborate, they show the operation of the whole. My proposal is this: That we are trying to establish what it costs

(Testimony of Clarence A. Kolstad.)

to produce a bushel of wheat, to farm an acre of ground, how much it costs per acre. It doesn't matter whether it is this precise land or whether it is land of a similar character. To be very honest and frank, my hope is that the witness might show what his cost of operation had been farming this type of land, let's call it that. I am willing to confess that counsel is quite right in this respect: When you have a larger operation, when you are farming three times as much land as this particular farm, he might be able to reduce the cost. We have been contending that is true, he might be able to reduce the costs somewhat. I would be [153] willing to confess that having testified what that cost was, he should be required to tell us those costs should be extended over more lands than these.

The Court: He has already said the larger the unit is, the cheaper it is to operate, so what does it prove? Are you then going to tell the jury after you introduce evidence of the cost, "Don't pay any attention to these figures I gave you because they cover a larger unit and I haven't had any experience just operating this smaller unit"?

Mr. Wiggernhorn: I am not going to argue about it to that extent, only it did seem to me, my point of view is this: While it is true we can't give the accurate figures of what it cost to farm this 5,100 acres, we can show generally what it costs on a larger operation. Confessedly then, in view of that fact, the witness confesses and acknowledges that it would cost a little more on this operation.

(Testimony of Clarence A. Kolstad.)

The Court: Let me tell you what you have done. You have asked the witness before the jury, "Have you kept records of this," you see?

Mr. Wiggenhorn: Yes.

The Court: Now, you see what that does to the jury? The jury is entitled, then, to expect a record of this operation, and if it is another operation, what difference does it make. If he wants to testify as to a general operation, or how much [154] it costs to raise a bushel of wheat, I suppose he can do that, but he can't base it upon any record of what he has done operating three times the land he is here concerned with. It just wouldn't help the jury.

Mr. Wiggenhorn: Here was my position—maybe your Honor will sympathize with me—when I asked if he kept records: A witness could go on the stand and say it cost me so much to raise a bushel of wheat, but when a fellow says, "I am not pulling that out of a hat, I have been keeping records of the operation over the years, whether on this farm or another one, I kept some records," he is talking with some degree of authority. When he says he can tell you from records he kept, he can tell you with some authenticity that it costs so much to raise a bushel of wheat.

The Court: Of course, he can tell you how much it costs to raise a bushel of wheat, but he is operating and raising wheat on a different spread than this is.

Mr. Wiggenhorn: Let's put it that way. The witness testified, "I have kept records, I know what I

(Testimony of Clarence A. Kolstad.)

am talking about, I am able to tell you it costs me so much to raise wheat on an operation three times as big as this one."

The Court: He has already destroyed the benefit of that altogether himself on the stand when he said the costs are different.

Mr. Wiggenhorn: I will admit that. [155]

The Court: All he has to do is tell us what the cost of operating on this size property is.

Mr. Wiggenhorn: I wish he could do it.

The Court: Get somebody that can. Just because he can't doesn't permit him to testify to something else.

Mr. Wiggenhorn: He can't pull it out of the air.

The Court: He can pull it out of the air, but he will suffer as a result of pulling it out of the air.

Mr. Wiggenhorn: Maybe we had better give your Honor my conception for what it is worth. We are always thinking—I believe we should in these cases, and your Honor has mentioned it yourself—when we are considering what the value is of lands, we must think of it in the light of what a willing buyer would pay. In other words, we must get all the information that a buyer would want to get. He wants to know the cost per acre of production, everything else that goes into an operation, before he will put his good money out. I am very sure a buyer would be extremely interested in the kind of figures—if he knows the man tells him, "It costs me so many dollars per acre to raise wheat," and told him it was on a larger operation than this, it is true it included

(Testimony of Clarence A. Kolstad.)

three times as much land. He knows he has got to discount the figure some for a smaller unit such as this.

The Court: I don't think it is relevant enough.

Mr. Wiggenhorn: I won't go any further, then, your Honor. [156]

The Court: Court will stand in recess until 2:00 o'clock.

(Noon recess.)

(Jury returns to Courtroom.)

Q. Mr. Wiggenhorn, do you know what ordinarily it costs to raise wheat on an acre of ground on a unit of this size in your area?

A. Yes; I do, approximately.

Q. How much does it cost per acre?

Mr. Galles: I will object to that as being immaterial unless a foundation is laid that it has some relationship to the market value of land.

The Court: Yes; that is, unless a foundation is laid that the cost of raising wheat has something to do or some relation to market value.

Mr. Galles: That's right.

Mr. Wiggenhorn: I am not sure I understand the implications of this.

The Court: I think, counsel, that the government's position is this: That what we are interested in is the market value. Now, the defendant has testified as to what the market value is. Now, if the cost of raising wheat doesn't have any relationship to the market value, then what is the evidence for? It

(Testimony of Clarence A. Kolstad.)

doesn't prove anything; it doesn't assist us in any degree.

Mr. Wiggenhorn: I don't want to find myself in the position of arguing; I am just trying to get straightened out. [157]

The Court: I would be glad to have a conference with you, counsel.

Mr. Wiggenhorn: Maybe that would be better. I don't know whether this is fundamental to your objection or not.

The Court: All right. We will save time in the long run, I believe, by having a conference.

(Jury admonished.)

(Jury withdraws from the Courtroom.)

Mr. Wiggenhorn: What I want to inquire is this: I think we have—I know before at pretrial conference there has been some discussion about whether or not earnings from land are material in connection with proving value, and I think, my own conception of it was that they themselves do not determine value, but, nevertheless, under the conception one has, a willing buyer and a willing seller, the willing buyer is concerned with earnings. He wants to know not only that the price that he pays is the reasonable market value, but also that he will have sufficient earnings to justify paying that price, and that while earnings do not themselves prove value——

Mr. Galles: That is the foundation I think has to be laid.

(Testimony of Clarence A. Kolstad.)

The Court: Just lay that foundation and we will admit it.

Mr. Wiggenhorn: We have got in evidence already what the reasonable value of it is. The rest would be argument, purely, what I have been saying so far is argument. [158]

The Court: Yes; what you are saying is argument, that is true.

Mr. Wiggenhorn: I can't lay the foundation for the jury with argument. Facts have to be presented to the jury.

Mr. Galles: That is the point. I am saying that the facts have to be laid as a foundation before the type of evidence you are attempting to get in now is admissible. Otherwise, it is immaterial to the issues.

Mr. Wiggenhorn: Would you object to telling me the type of fact? It seems to me——

Mr. Galles: I don't think counsel needs any assistance from me in this matter.

Mr. Wiggenhorn: Frankly, I will acknowledge my complete shortcomings, then, because it seems to me all one can do it to show with respect to—if it is conceded we may show earnings, there is nothing else you can do but show what this particular unit has earned——

The Court: I think counsel agrees with everything you say.

Mr. Wiggenhorn: What is left for me to do, then? I don't understand.

(Testimony of Clarence A. Kolstad.)

The Court: Just very simply, it is just to have the witness say those things.

Mr. Wiggenhorn: Do you want me to have the witness reason as I did.

The Court: Just have the witness say that earnings affect [159] market value. That is all you have to have him say, as far as I can see. Isn't that your position?

Mr. Wiggenhorn: I will do it with tongue in cheek because I think that is invading the province of the jury. He is not testifying to facts.

The Court: The point counsel makes is this: He says, "I know the market value," and he has testified what it is. Now you are asking him about an element of that market value. First, you should ask him what are the elements of market value, and then if he says that in his opinion, earnings or production or whatever else it is are a part of the things that make up market value, why, then, you can proceed. Is that your position, counsel? That is, as I understand it, and that is as I understand the law.

Mr. Wiggenhorn: Very well, I think that is all, then. The jury may be recalled as far as I am concerned.

The Court: Very well.

(Jury returns to Courtroom.)

Q. (By Mr. Wiggenhorn): Mr. Kolstad, do earnings enter into——

Mr. Galles: I will object to the form of the question as it starts as a leading question.

(Testimony of Clarence A. Kolstad.)

The Court: Quite obviously it was going to be a leading question.

Q. What, ordinarily, Mr. Kolstad, enters into an opinion on [160] market value?

A. Oh, there's a lot of different things, the distance it is from the elevators for delivering wheat, the size of the block, as to whether it is blocked up nice for large fields, and its ability to produce as to its net profit, how much it cost to raise it in the particular area where it is.

Q. Do you know what it costs to raise wheat on an acre of ground of the character here in this size unit we are dealing with that you own?

A. Yes; I do.

Q. What is the cost per acre?

A. It would be in the neighborhood of thirteen or fourteen dollars per acre.

Q. Is that also translatable into bushels, are you able to say how many bushels it takes?

A. Yes; it would be around two dollars or a little better per bushel, it would run about—between six and seven bushels per acre.

Q. By the way, were there any improvements on this farm of yours at the time it was taken?

A. Some fences.

Q. Other than fences, was there anything?

A. There was a sheep shed on it.

Q. How large was the sheep shed?

A. Oh, I'd judge about a hundred by a hundred. It was a [161] straw roofed shed, made out of poles.

Q. How many miles—well, how much fence, in

(Testimony of Clarence A. Kolstad.)

miles or otherwise, was taken by the land that was taken? A. Oh, I'd judge about ten miles.

Q. If we consider what was left after the taking, are you able to tell us what—how many miles of new fence would have been required to enclose the remainder of the land?

Mr. Galles: I will object to that as being immaterial.

The Court: Sustained.

Q. Well, however that may be, the value of the fence that was there on the land that was taken, and the sheep shed that you have mentioned, did you add that to the calculation you made as shown in your Exhibit 6, or did you not? In other words, did you add that to the value, or was that considered in the value?

A. I just really threw it in; it is considered in there.

Q. So that when you arrived at a \$450,000 value before the taking, which you justify here by a somewhat larger figure, you just didn't give any added consideration to the improvements you have testified to? A. No; I didn't add it in.

Q. Now, then, so much for this place of yours, Mr. Kolstad. At the time of the taking, did Alta A. Kolstad also own a place? A. Yes. [162]

Q. And Alta A. Kolstad is your wife, is she not?

A. Yes; she is.

Q. Where does the place of Alta A. Kolstad lie with reference to your place?

A. Just to the north.

(Testimony of Clarence A. Kolstad.)

Q. Will you mark—will you step down here again, Mr. Kolstad—this morning you marked on this map the general outlines of the place owned by you, will you likewise do that with the Alta A. Kolstad place?

(Witness does as requested.)

Q. And you have written on that portion, you have marked Alta A. Kolstad in red?

A. Yes, sir.

Q. Does it extend likewise into Toole County?

A. No.

Q. It is all in Liberty County?

A. It is all in Liberty County.

Q. You may resume the stand. So then when we get back to Defendants' Exhibit 5, it lies to the north and slightly west of 5, does it, or just north of 5?

A. Just north, directly north. It fits right into it, there is no land in between them.

Q. Are you familiar with that place of Alta A. Kolstad? A. Yes; I am.

Q. What exactly have you had to do with it? [163]

A. I have been operating it.

Q. How long have you been operating it?

A. Since 1942.

Q. Have you operated it ever since Alta Kolstad has owned it?

A. Only for a five-year period when it was leased out.

Q. And during that five-year period when it was

(Testimony of Clarence A. Kolstad.)

leased out, your own was likewise leased out, wasn't it? A. Yes.

Q. So that the fact is that you have been operating this place along with your own place?

A. Yes.

Q. All through the years that you have been operating your place? A. That's right.

Q. Now, I have again put on the easel here another exhibit, and will you mark this, please, Mr. Clerk?

The Clerk: Defendants' Exhibit 7.

Q. The exhibit I have just referred to has been identified and marked as Defendants' Exhibit 7, and will you tell us whether this, in similar manner to the previous Exhibit 6, I guess it was—5, is likewise a map of the Alta A. Kolstad place with the coloring representing the classifications as you have testified? A. Yes. [164]

Q. How many acres in that place?

A. About 4,700.

Q. Now, do you have the same familiarity with that place as you do with your own?

A. Yes; I do.

Q. You, yourself, have been farming it, excepting, as you say, when it was leased?

A. Yes.

Q. The last three years, however, it has not been leased, nor has yours been leased, is that correct?

A. No; I operated it.

Q. I believe you testified this morning also that

(Testimony of Clarence A. Kolstad.)

you are familiar with the market value of farms in that vicinity? A. Yes.

Q. And can you give, can you tell us—are you able to tell us what the fair market value of this farm is the same as you did about your own, to the same extent? A. Yes; I am.

Q. And have you likewise again prepared or had prepared a statement, breakdown of the classifications and values similar to our Defendants' Exhibit 6? A. Yes.

Mr. Wiggernhorn: Your Honor, I neglected to pass Defendants' Exhibit 6 to the jury. May I do that now? That was the one that was introduced this morning and received in [165] evidence?

The Court: Yes.

Q. I hand you what has been marked as Defendants' Exhibit No. 8. Now, then, referring to the exhibit—— A. You gave me the wrong one.

Q. I did? A. That is the joint one.

Q. To keep the record straight, I am now withdrawing from you what is marked Defendants' Exhibit No. 8, and hand you in place of it Defendants' Exhibit No. 9, and do you identify that as the statement you just referred to that shows the breakdown of classifications for the Alta A. Kolstad place?

A. Yes.

Q. Very well. How many acres are there altogether, were there altogether in the Alta A. Kolstad place before the taking, immediately before the taking on May 24, 1955? A. 4,699.87.

(Testimony of Clarence A. Kolstad.)

Q. They are shown on Exhibit No. 8, are they not? A. Yes.

The Court: No; wait a minute, Exhibit 8 is the one you just marked.

A. This is No. 9.

Mr. Wiggernhorn: No. 9. I thank you, your Honor.

Q. And that is the same land that is here before us as Defendants' No. 6, is it—no, No. 7? [166]

A. Number 7.

Q. Now, on this map, Defendants' Exhibit No. 7, will you in similar fashion, to save as much time as we can, again explain what the colorations are on that map, identifying them in each instance as to what classification they represent? You can do it from the chair. A. Red is the tillable.

Q. Red is the tillable, and blue is?

A. Blue is the—I have got to look—blue is the bottom land.

Q. As I observe here, there is just a very little small piece of that? A. Green is grazing.

Q. Red throughout is the tillable?

A. That's right.

Q. And green is what? A. Grazing.

Q. Green is grazing, and we have another color here, what is it, yellow? A. Orange.

Q. That is orange, and what does that represent?

A. Alfalfa. There is only a small part of it.

Q. Identify what you refer to as orange? It isn't very much distinguishable from yellow, is it? But it is this little piece here of probably 120 acres, or something like [167] that?

(Testimony of Clarence A. Kolstad.)

A. No; about 12 or 15 acres.

Q. About 12 or 15 acres of alfalfa. That was in alfalfa at the time of taking? A. Yes.

Q. Then, the yellow is breaking, as it was in the previous exhibit?

A. Yes, and the black is plowed.

Q. And as to this breaking, what you told us before is true, is it— A. Yes.

Q. That it was broken at the time of taking, but had not yet had a crop?

A. It was in summer fallow at the time of taking, and cropped in 1956.

Q. Again, for all purposes, the black and yellow are classed the same by you as plowed ground, are they not? A. Yes, sir.

Q. Very well, with that knowledge, how many acres, at the time of taking or immediately before, how many acres of this Alta Kolstad place were plowed, cultivated? A. 1,666.59 acres.

Q. And how many acres were tillable, did you classify as tillable? A. 1,134.99. [168]

Q. How many acres did you class as grazing land? A. 1,843.29.

Q. And I think you told us probably 12 acres of alfalfa? A. 12 acres of alfalfa.

Q. And were there any other bottom lands there?

A. 43 acres of those creek bottom lands.

Q. That would be blue, would it, I guess that is what you told us? A. Yes.

Q. All right, then, would you—are you able to give us your opinion of the reasonable market value

(Testimony of Clarence A. Kolstad.)

of that entire unit immediately before the take, that is, the Alta A. Kolstad unit? A. Yes.

Q. How much? A. \$342,955.70.

Q. That is what you have broken it down to, and that is what you considered to be the fair market value at that time? A. Yes; I do.

Q. Now, then, the way this exhibit works, as I understand it, on the first overlay, it will show through the transparency the entire tract as it appeared before the take, classified as you have told us?

A. Yes.

Q. When I remove the first sheet of it, the first transparency, [169] what do we find now represented?

A. That is what is remaining after the taking.

Q. As before, is the cross-hatching portion here, does that represent the reservoir?

A. Yes; that's it.

Q. That will finally be the reservoir after it is filled? A. That's right.

Q. Approximately, as you told us this morning?

A. That's right.

Q. Does it show there how that land lies with respect to that reservoir that was left after the take with respect to this Alta A. Kolstad place?

A. Yes.

Q. I note, for example, here, on the south part, and I think you refer to that as the south unit in some of your testimony—— A. Yes.

Q. The south part has a limited number of acres.

(Testimony of Clarence A. Kolstad.)

Do you know how many acres there are there, each square represents 40 acres, does it?

A. There is 360 acres.

Q. Nine times 40, I guess that is 360 acres?

A. Right.

Q. And your Exhibit No. 9 will show, will it not, how you have broken those down after the take? Let's proceed and go [170] through them. Let's take the north unit first. When we refer to the north unit—this is remaining—it would be all of the land north of the reservoir, whether lying contiguous or not, is that true? A. Yes.

Q. By the way, what is this marked yellow here?

A. Well, it is a correction.

Q. Is it a part of the breaking? A. Yes.

Q. That was Alta's ground, was it not?

A. Yes; it is, but it was a correction on the map.

There was an error in it.

Q. But it is actually what you have classed as breaking, have you not? A. Yes.

Q. Well, now, then, looking at that north unit, considering all of it, how many acres did you classify as plowed ground as shown by Exhibit 9?

A. 802.70 acres.

Q. And how many acres of tillable?

A. There are 870.05.

Q. And how many acres of grazing land?

A. 844.20.

Q. Was there any bottom land left at all after the take? A. No. [171]

Q. No bottom lands. Any alfalfa? A. No.

(Testimony of Clarence A. Kolstad.)

Q. So, they were wiped out and buried under water, were they? A. Yes.

Q. Now, let's take a look at the south unit, that is, the smaller piece there below the reservoir. How many acres of plowed ground remained there?

A. 232.90.

Q. How many acres of tillable land?

A. 105.74.

Q. How many acres of grazing?

A. 13 acres.

Q. And bottom land and alfalfa were again obliterated, were they?

A. Yes; there wasn't any.

Q. None remained. And in valuing the land, let's look at the north unit first. You had 1,666 and a fraction acres of plowed ground. What did you value that at at the time of taking?

A. You are talking about the unit before the taking now, is that right?

Q. Yes; I said at the time before the take.

A. At \$120.

Q. So that carries out for that many acres at what figure? [172] A. \$199,990.80.

Q. I notice that you have valued that at five dollars less than you did on your own land?

A. It is a smaller unit.

Q. Is that the only distinction you make, because it is a smaller unit? You mean by that it is a less number of plowed acres? A. Yes.

Q. In the other one, you had 2,551 plowed acres,

(Testimony of Clarence A. Kolstad.)

and in your wife's tract, you only have 1,666, is that your reason for reducing it by \$5?

A. That is my idea of efficiency in operation. It is a smaller unit, and it isn't worth as much.

Q. All right, it is the same thing you spoke about. The tillable, you valued at what? A. At \$90.

Q. You valued it at \$90, and extended for that 1,134 acres, how much did it amount to?

A. \$102,149.10.

Q. What did you value the grazing at?

A. At \$20.

Q. That extended would be how much?

A. \$36,865.80.

Q. And then we have the 12 acres of alfalfa here.

What did you value that at? [173] A. \$150.

Q. I think we never mentioned the value of alfalfa before because on your place there was none?

A. No.

Q. And what is your justification of that value, if you have any?

A. Well, I feel that this was under irrigation. I had it irrigated by a well I had there, and I feel that irrigated land was worth more money than wheat land by a little. I valued it at \$150.

Q. As alfalfa land in itself, what did it produce on the average per year in the way of hay?

A. The last two years I didn't raise any hay on it. Before that we produced—just took one cutting from it, about a ton and a half.

Q. Was that all that it was capable of producing, one cutting?

(Testimony of Clarence A. Kolstad.)

A. No, it wasn't but we just didn't tend to it, it was such a small acreage, and we never paid too much attention to it. We was too busy raising wheat.

Q. You are referring to this particular 12 acres (indicating)? A. That's right, 12 acres.

Q. All right. Now, then, what about the other 43 acres of bottom land, what did you value that at?

A. \$50.

Q. And that extended is \$2,150? [174]

A. That's right.

Q. That is the way you came to make up your total of \$343,955.70, is that right? A. Yes.

Q. Now, again, going back again to look at the tillable, I see you have classified it and valued it at \$90 an acre, whereas, in the case of your own parcel, you valued it at \$95 an acre. Would the same explanation hold that you gave a minute ago for the cultivated land, you reduced it \$5 an acre in her case because of the smaller size of the operating unit?

A. Yes.

Q. The grazing land, you valued at the same as yours, and the bottom land I see you valued at \$50 per acre in this case. Now, let's take a look at the value after taking. Do you distinguish between the north and south unit?

A. Yes; I took them separately.

Q. You might tell us first whether the two could in any manner be operated or considered as a remaining unit, and if not, why?

A. No; because there is too much water in be-

(Testimony of Clarence A. Kolstad.)

tween and it is a little too deep. In order to get around, it would take, oh, about 12 or 14 miles to drive around on other people's wheat to get from one to the other.

Q. In the other case, in your own case, of course, you did [175] have to go around the lake formed by the Marias River, while in this case we have to go around the portion of the lake formed by Willow Creek? A. That's right.

Q. So, it isn't quite as far around as you told us this morning it was in your own case?

A. No.

Q. It still is how much?

A. Oh, 12, 14 miles.

Q. And does that make it such a distance as the difficulties presented in moving equipment make it so you couldn't operate it as one unit?

A. No, because you can't get through there with equipment unless you got a right of way from the neighbors.

Q. Very well. Now, let's take a look at the north unit. First, what did you value the remaining plowed or cultivated ground at per acre?

A. On the north unit, \$100 per acre.

Q. How many acres were in that?

A. 802.70.

Q. And that extended out makes how much?

A. \$80,270.

Q. You valued those 802 acres and a fraction acres at \$80,270 at \$100 per acre. I notice you de-

(Testimony of Clarence A. Kolstad.)

preciated it from its before value by \$20, and what is your justification for [176] that?

A. Because it made the unit smaller. It isn't more than about half as large as it was.

Q. Is your opinion, then, for the purposes of valuation that it justifies you in reducing it \$20 by reason of this differential in the size of the two units, it is about half the size of what it was before?

A. Yes; I think I am leaning over backwards. It has gotten to the point where it isn't even an economic unit.

Q. What about the tillable ground, you have 870 acres there, and you valued that at what?

A. \$80.

Q. Carrying it out, that would be \$69,604, is that correct?

A. That's correct.

Q. I notice there that you have dropped \$10 again per acre from what you valued the tillable ground in the larger unit before, in the whole unit before the taking. Do you justify that for the same reason that you did just a moment ago for reducing the value of the plowed ground?

A. Yes; I do.

Q. However, you only reduced it \$10 an acre in the case of tillable, whereas you reduced it \$20 in the case of the plowed ground. Have you any explanation for that?

A. Well, there is less tillable there, and the plowed ground that is plowed has a quicker value to me than tillable ground [177] because it takes

(Testimony of Clarence A. Kolstad.)

two years to get it into production, so I gave more drop in value to the plowed ground.

Q. How many acres of grazing land did you have left in the north unit? A. 844.20.

Q. And you valued that at what after the take?

A. \$5. It has been cut away from water, and has gotten so small it really has no value as a unit. It wouldn't carry any stock anyway.

Q. Is water available from any source for that grazing land remaining there?

A. Two sources away in the west end, the artesian well and the reservoir within a quarter of a mile of each other.

Q. There is an artesian well? A. Yes.

Q. And could stock get from that grazing land over to the artesian well?

A. Well, the grazing land is in the east end, it is about four or five miles away.

Q. You are suggesting it is too far away, is that what you are driving at?

A. Yes, for most of the grazing land, yes.

Q. What, then, was the total of those valuations for the north unit remaining, what does that amount to as you valued these classifications? [178]

A. \$154,095.

Q. Looking now at the south unit, how many acres of plowed ground remained down there?

A. 232.90.

Q. And you valued that at what price?

A. \$90.

Q. Let's pause there a minute again. That is \$10

(Testimony of Clarence A. Kolstad.)

under that \$100 value you put on that ground in the north unit. What is your explanation or justification for that? A. It should be less, I guess.

Q. Less than what?

A. I have got it too high; it is all by itself.

Q. You mean \$90 is too high or \$100 is too high?

A. \$90 is too high.

Q. So you think that you were over-generous there, do you? A. I think I was.

Q. But, at any rate, that is what you have, and that is what you arrived at——

A. I am going to leave it there.

Q. And that is what you are testifying to here now, are you? A. Yes; I am.

Q. And that extended out amounts to \$20,961, does it? A. That's right.

Q. You have 105.71 acres of tillable left, do you, on the south unit? [179] A. Yes.

Q. What did you value that at? A. \$70.

Q. Carried out, that would amount to how much?

A. \$7,401.80.

Q. I take it that your justification for cutting that down to \$70 from \$80 that you allowed for the north unit, and from \$90 that you allowed for tillable land before taking is for the same reason you have just given in the case of the north unit, only the south unit is still smaller, is that right?

A. That's right.

Q. How many acres of grazing were left in the south unit?

A. 13 acres—no—yes; 13 acres.

(Testimony of Clarence A. Kolstad.)

Q. This little patch of green in here (indicating)? A. Well, it is a draw.

Q. That is a draw there? A. Yes.

Q. Well, did you put any value on that at all?

A. No; I didn't; it has no value.

Q. Well, why do you say that?

A. It can't be used for grazing.

Q. It is impractical to use it for grazing purposes on that small a unit?

A. It would be pretty hard to run cows on 13 acres. [180]

Q. So your total value, then, for the south unit is how much? A. \$28,362.80.

Q. Did you add together, and is it shown here on your exhibit what the sum of the north unit and the south unit are? A. Yes; \$182,457.80.

Q. And you have previously testified that your value of the entire 4,699 acres before the take was \$342,955 and some cents, and you have just told us what the value of the two separate units, as given by you, remaining here, and what is the difference between those? A. \$160,497.90.

Q. Now, going back again to look at the entire unit before the taking at the value that you have ascribed to it and given your opinion, how much does that figure across the board per acre?

A. \$75.

Q. And how many acres were actually taken, that is the difference between the amount taken and the amount remaining? Do you have that figure? I think

(Testimony of Clarence A. Kolstad.)

you have it in a memorandum in your pocket if you don't have it before you.

A. 1,831.28 acres taken.

Q. Did you also calculate what price—withdraw that much. If you calculated that 1,831.28 acres at \$75 an acre, the price which was your across-the-board price before the taking, [181] for your entire tract, what figure do you get? A. \$137,325.

Q. Did you also figure how—withdraw that question. Oh, yes, are there improvements on this place, Mr. Kolstad?

A. Yes; there was a set of buildings and some fence.

Q. Well, tell us briefly what buildings there were on the place.

A. Well, there was a ranch house, a five-room house; there was a barn, a workshop, a bunkhouse, a small garage, that's it.

Q. Could you give us your opinion about the fair market value of those improvements?

A. Oh, I roughed them in at about \$7,000.

Q. You have mentioned an artesian well, was that also on this place?

A. It is just out of the taking.

Q. Can you locate it for us here?

A. I think so. Yes; it's right here (indicating). It really isn't in the taking, this is a little wrong. Right in the corner of that. The water shouldn't be up there, that 40 isn't in the taking.

Q. It should be just above that out of the taking?

(Testimony of Clarence A. Kolstad.)

A. Yes; maybe the map is just a little bit wrong—right on the edge of the taking.

Q. You admit that artesian well was not destroyed and [182] was left to you? A. Yes.

Q. It is still there? A. It is still there.

Q. What about that artesian well, what is its value, what purpose does it serve?

A. Well, it was a good well for irrigation, and I had—I was building up to irrigate the land below it there, but that's all in the take. Now, there is no more level land where the well site is. Oh, there is a few acres left, but the water should have gone from that well over on this land that's in the take.

Q. For irrigation purposes, if you were going to irrigate with it, why the land within the take would have been irrigated from the well?

A. That's right.

Q. Can you tell me whether it is bottom land or plateau land?

A. It is bench land from Willow Creek.

Q. What kind of a well was it? How deep was it?

A. Twenty-two hundred feet.

Q. How did it happen to be there?

A. Well, it was supposed to have been oil, but it turned to water, so I bought the casing and saved it.

Q. You saved it. You mean it was drilled [183] for oil? A. Drilled for oil.

Q. The well had a casing in it? A. Yes.

Q. Never been pulled or removed?

A. No; I bought it.

Q. Casing still in the well? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. Was it flowing, a continuously flowing well?

A. Yes; it had 130 pounds pressure at the top of the hole.

Q. Are you able to tell us about what the flow was in miners' inches, or don't you know anything about miners' inches?

A. No; when the drillers were there, one of the men knew something about the capacity and he said it would put out about 20,000 barrels a day, that is in twenty-four hours.

Q. Is it still flowing?

A. Well, it is shut off, it will flow if I open it.

Q. It doesn't have to be pumped?

A. Oh, no; not at 130 pounds pressure.

Q. Do I understand then that the land remaining there on the Alta Kolstad place with the well serves no useful purpose, or does it serve as stock water?

A. It will serve as stock water at that end of the place. [184]

Q. Had the land not been taken and Mrs. Kolstad kept the land as it was before the taking, would that water also serve to assist in watering stock?

A. Oh, yes.

Q. However, as I understood you to say before the taking on this Alta Kolstad place, likewise on your place, there was ample water for stock from Willow Creek, is that right?

A. Yes; that's right. This water was good for winter, it was warm water, and better than chopping a hole in the ice.

(Testimony of Clarence A. Kolstad.)

Mr. Wiggenhorn. You have Exhibit 9 there now, do you? We will now offer in evidence Defendants' Exhibit 9.

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 9, being statement showing breakdown of classifications for the Alta A. Kolstad place above referred to, was here received in evidence.)

Mr. Wiggenhorn: Now, we offer also—withdraw that.

Q. With reference to this Defendants' Exhibit 7, similarly as in the case of the earlier Exhibit 5, was this made again from your own maps?

A. Yes.

Q. And this is a duplication of your maps in a similar manner as the other Exhibit 5 was made up?

A. Yes; same way, by the same man. [185]

Mr. Wiggenhorn: We offer in evidence Exhibit 7, Defendants' Exhibit 7.

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 7, being the map above referred to, was here received in evidence.)

Q. Now, then, do you have an interest in another unit on the farm beside the two you have testified to, one belonging to you and one to your wife, now is there a third one? A. Yes.

Q. Who does that belong to?

(Testimony of Clarence A. Kolstad.)

A. We own it jointly.

Q. You and who? A. Mrs. Kolstad.

Q. Come forward again and identify that on Exhibit 2.

A. It is going to be kind of rough.

Q. Just give an approximation.

(Witness does as requested.)

Q. You have marked that "Joint"?

A. Yes.

Q. That is outside of Liberty County, as this map shows, but you intend to say that adjoining out in the west is Toole County, and this is entirely within Toole County, is it?

A. It jogs back and forth. [186]

Q. It is principally in Toole County?

A. Yes.

Q. And where does it lie with reference to the Alta Kolstad place and your own place, the Clarence Kolstad place?

A. Well, mine is in here (indicating). Mrs. Kolstad's is in this area, and this is the county line (indicating).

Q. Let's get that for the purpose of the record. You are now pointing to something on the new exhibit I have put up here, Defendants' Exhibit 10, and maybe for the purposes of identification, similarly as in the previous exhibits with respect to your place and Mrs. Kolstad's place, the exhibits numbered——

A. 5 and 7.

Q. 5 and 7, thank you; you have here depicted

(Testimony of Clarence A. Kolstad.)

the farm or unit owned by you and Mrs. Kolstad jointly, have you not? A. Yes.

Q. And, now referring to Defendants' Exhibit 10, will you orient us and show us where your place——

The Court: Pardon me. I think I will take a recess now before we get started on the new exhibit. (Jury admonished.) Court will stand in recess until 10 minutes after 3:00.

(10-minute recess.)

Q. Now, this unit you have told us about owned jointly by you and Mrs. Kolstad, did you likewise have prepared a plat similar to Exhibits 7 and 5, the respective plats for the [187] Alta Kolstad place and the Clarence Kolstad place, did you likewise prepare a third one for the jointly held property?

A. Yes; I did.

Q. And that is the one that is now on the bulletin board and has been marked as Defendants' Exhibit 10? A. Yes.

Q. Did you follow the same plan in the classification and in the colorations appearing on that map as in the other two? A. Yes.

Q. I observe, and I think I should make a confession properly to the Court, we found an error during recess. We neglected to complete this map. I would improvise a little bit and have the witness explain. I see that there is an extra marking here in the way of cross-hatching in blue on some of this map that was just put in here during recess?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Q. What does it represent?

A. It is mostly bottom land. There is just a little alfalfa sticks into it which won't show now.

Q. At any rate, this much is true: Everything shown in color, including the cross-hatching in blue, was part of the land owned by you and Mrs. Kolstad jointly before the taking? A. Yes.

Q. Did you use the same color scheme and designations as you did in the other two? [188]

A. Yes.

Q. Now, then, did you also again work out the tabulations on a sheet as you did in the other two cases? A. Yes; I did.

Q. I hand you now Defendants' Exhibit 8, and ask you to identify that as to whether that is the sheet you are referring to? A. Yes; it is.

Q. What do you state to be in your opinion the reasonable, the fair market value at the time of the taking of the entire tract, and by the way, how many acres are in that tract? A. \$7,423.15.

Q. And what is your opinion as to the fair market value of that immediately before the taking?

A. \$507,981.70.

Q. And now we shall proceed as before to break that down. How many acres of that is plowed ground, before the take? A. 1,560.48.

Q. What did you value that at? A. \$115.

Q. An acre? A. Yes, sir.

Q. Amounting to how much for the full acreage?

A. \$179,455.20. [189]

(Testimony of Clarence A. Kolstad.)

Q. Now, I observe that again you have dropped your value from the other two tracts, the unit value per acre for the plowed ground to \$115. You had them at \$125 and \$110 before. What is your explanation of that?

A. Most of this ground is south of the river, and it is a little lighter soil; it is not as good soil as north of the river.

Q. I think I misspoke there in the reference I made to the previous land. It was \$125 and \$120, and this one you made \$115? A. That's right.

Q. You say there is a little lighter soil on part of it? A. Yes.

Q. Which part? A. South of the river.

Q. How many acres of tillable ground on that tract originally? A. 1,754.48.

Q. And that you valued at how much?

A. \$95.

Q. And that extended out to how much?

A. \$166,635.60.

Q. Again, did you drop that valuation down from the previous value you put on the Clarence Kolstad and the Alta Kolstad properties? [190]

A. I don't think I dropped it at all because most of the tillable land is north of the river.

Q. I observe you have it valued at the same price you did on your own land, the tillable at \$95 an acre, is that right? A. Yes.

Q. I think you have extended that. How many acres of grazing land were there?

A. 2,123.62.

(Testimony of Clarence A. Kolstad.)

Q. What did you value that at? A. \$20.

Q. The same value as in the other two cases, did you? A. Yes.

Q. Extended it amounts to how much?

A. \$42,472.40.

Q. How many acres of alfalfa ground, if any, were on this tract? A. 201.50.

Q. And that you valued at how much?

A. \$150.

Q. You have already justified that value before. Does the same hold true with respect to this alfalfa ground as in the case of Alta Kolstad?

A. Yes; this was located on the Marias River on the bottom.

Q. You do have a considerably larger acreage on the joint tract, do you not, than on the Alta Kolstad tract? [191] A. Yes.

Q. Of alfalfa, is that right? A. Yes.

Q. How many cuttings of hay were you getting off of that during the years past? A. Two.

Q. Was it capable of producing more than that?

A. No; that is all there was produced in that area; that is as long as the season is.

Q. Is that one cutting or more than one cutting?

A. Two cuttings.

Q. How many tons per acre did you get per year?

A. It would average out about two to two and a half.

Q. I think probably we should make that clear here. What is classified by color here as alfalfa

(Testimony of Clarence A. Kolstad.)

ground is what I would call orange and will be shown here on the map, I believe. Was any part of it what we have now cross-hatched in blue? Was any more of that in alfalfa that is not shown in the map?

A. I think there was a little stretch in there, but, anyway, the 201 acres is down in that area.

Q. That is correct; 201 and a fraction?

A. Yes.

Q. How many acres of bottom—extended the 201 and a half acres extended at \$150 amounts to how much? [192]

A. \$30,225.

Q. How many acres of bottom land in addition to the alfalfa were there in this tract?

A. 1,783.07.

Q. That you valued at what? A. \$50.

Q. Extended it amounted to how much?

A. \$89,153.89.

Q. What you gave us before in justification for that value on the bottom land on the other places holds true here, does it? A. Yes.

Q. You think it is worth \$50 an acre under the circumstances you outlined before?

A. Yes; some is good, clear bottoms and the others are brushy bottoms. One of them was real good for wintering.

Q. Are there trees and brush on parts of these bottoms? A. Parts of them, and parts aren't.

Q. Do they serve any useful purpose?

A. Wintering stock, certainly.

Q. Shelter? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And what about any bluffs otherwise, the natural contour of the ground, the ridges and so forth, are there any such there along the bottoms to form shelter for cattle? [193] A. Yes.

Q. What have you to say as to bottoms as to whether they are suitable for feeding cattle and wintering them?

A. It's the best place there is.

Q. Those are right on the Marias River, are they not? A. Yes.

Q. They are better than the bottoms on Willow Creek?

A. Yes; they are deeper and larger bottoms.

Q. Now, we will go through the same operation and take the first sheet off here, which, as I understand, represents the entire tract, and the first sheet has only the taking on it, and we have left then—what is depicted here?

A. How many acres?

Q. What is shown there. Tell us what you find here?

A. That is what is left remaining after the taking.

Q. There is no mistake about this?

A. No; that is correct.

Q. So again we have the lake shown in cross-hatching as before, do we? A. Yes.

Q. It graphically displays, does it not, how the lake separates this into two parcels now, does it not?

A. Yes.

Q. So you might tell us again whether that lake,

(Testimony of Clarence A. Kolstad.)

as before, prevents farming these two separated pieces as one unit, or [194] can that be done?

A. No; they are too far apart.

Q. How many miles to get around from one to the other?

A. 45 miles from one side around the dam over to the highway and back to the other side.

Q. You have to go over the dam there to get from one to the other?

A. That is correct. There is another way, but that is 80 miles.

Q. To return then to the unit, and by unit, I refer to that north unit, how many acres of plowed ground do you have remaining on the north unit?

Mr. Galles: I will object to this question. There is no foundation laid that they should be treated as separate units.

The Court: In what respect?

Mr. Galles: In regards to market value. I think there was one more question, probably, in the record necessary.

Q. Very well. With regard to the north unit, directing your attention to that first, how many acres did you have in the north unit of plowed ground?

Mr. Galles: I will withdraw the objection. He can proceed.

Q. How many acres? A. 186.40.

Q. And how many acres of tillable? [195]

A. 1,256.90.

Q. Now, then, I will anticipate what counsel has

(Testimony of Clarence A. Kolstad.)

indicated. Will you tell us whether or not this unit as there presented, this north unit, stating as you do it is now isolated from the south portion, as now presented, is sufficiently large in plowed and tillable ground to operate as an economic unit? Could it be economically farmed? A. No; it can't.

Q. You only have 186 acres of plowed ground?

A. Yes, but there is another 1,200 to be plowed, but it would still be only about 1,300 acres.

Q. What value do you put on the 186.40 acres of plowed? A. \$100 an acre.

Q. I think that is the same value you put on the remaining units in the other two cases, is it not, for the plowed ground? A. Yes.

Q. Extended it amounts to how much?

A. \$18,640.

Q. And the tillable acres, the 1,256 acres, what value do you attach to that? A. \$80.

Q. Which, I believe, is the same as you applied to your own and Alta Kolstad's, is that right?

A. I don't remember just how they came [196] out.

Q. Well, it is unimportant. Extended that amounts to how much? A. \$100,552.

Q. How many acres of grazing?

A. 1,030.87.

Q. That you valued at what? A. \$5.

Q. And extended it amounts to how much?

A. \$5,154.35.

Q. Is there any alfalfa ground left in the unit?

A. None.

(Testimony of Clarence A. Kolstad.)

Q. Or any bottom land left? A. No.

Q. All taken by the lake, were they?

A. Yes.

Q. Then, that is all we had of land remaining in the north unit? You have accounted for all of it?

A. Yes.

Q. The total is how much in value?

A. \$124,346.35.

Q. And now, taking a look at the south unit, let's see if we have an economic unit there. How many acres of plowed? A. 1,006.48.

Q. How many acres of tillable?

A. 188 acres. [197]

Q. In your opinion, do those two, the total of those two as potentially plowed ground, is that sufficient acreage to make an economic unit?

A. No.

Q. What value did you put on the 1,006 acres of plowed ground? A. \$90.

Q. And on the 180 acres of tillable?

A. \$70.

Q. And extending out the 1,006 acres at \$90 makes? A. \$90,583.20.

Q. And the tillable extended amounts to how much? A. \$13,160.

Q. And then you had how much grazing land left in the south unit? A. 235 acres.

Q. You valued that at what? A. \$5.

Q. And it extended to how much?

A. \$1,175.

Q. Any alfalfa ground left in the south unit?

(Testimony of Clarence A. Kolstad.)

A. No.

Q. Bottom land? A. No.

Q. We have accounted for all the land remaining in the south [198] unit? A. Yes.

Q. And the total is how much?

A. \$104,918.20.

Q. Have you added together the total remaining in the north unit and that remaining in the south unit? A. Yes.

Q. And what is that? A. \$229,264.55.

Q. Tell us now what your opinion is of the fair and reasonable market value of the remaining land in this joint unit, what the reasonable value was after the take, immediately after?

A. I didn't follow you.

Q. Tell us now what you give as your opinion of the reasonable market value of the land remaining, including both the north unit and the south unit, after the taking?

A. That would be—I thought I gave that to you.

Q. You gave me the sum of the two. I want to know if the sum of the two is your opinion of the fair market value? A. Yes.

Q. Will you give us the figure again?

A. \$229,264.55.

Q. Did you also compute the difference between that value remaining and the value you gave of \$507,981.70 for the [199] value before taking? Did you compute the difference? A. Yes.

Q. What is the difference? A. \$278,717.15.

Q. And as in the other two cases, did you com-

(Testimony of Clarence A. Kolstad.)

pute, with the value you have attached to the entire 7,423 acres before the taking, did you compute the figure of the across-the-board price per acre?

A. Yes.

Q. What was it? A. \$68.50.

Q. \$68.50 per acre across the board is the price you arrived at for the entire 7,423 acres before the taking? A. Yes.

Q. Did you also figure, by these figures that you have just testified to, what the remaining acres—by the way, you might tell us how much acreage there is left? A. There is exactly 3,903.65.

Q. How many were taken? A. 3,520 acres.

Q. And on this 3,903.65 acres, did you calculate what the across-the-board price would be at the value you have attached to it?

A. Yes; \$58.75.

Mr. Galles: How much. [200]

A. \$58.75.

Q. Now, were there any improvements on this jointly owned property?

A. Yes; there was a large barn and a lean-to, a large hog house and a large chicken house.

Q. A bunkhouse on it?

A. No; the house was lost in the flood, and so was the bunkhouse.

Q. What did you value those improvements at at the time of the taking? A. Around \$8,000.

Q. Was likewise some fence taken?

A. Yes.

Q. How much?

(Testimony of Clarence A. Kolstad.)

A. Oh, roughly, about 12 miles.

Q. At any rate, whatever that may be worth, the improvements you have spoken about, did you take them into consideration or add them to the price or figure them in your value or disregard them?

A. Disregarded them.

Q. These values you have given are without regard to the improvements you have told us about?

A. Yes.

Mr. Wiggenhorn: You may cross-examine. [201]

Cross-Examination

By Mr. Galles:

Q. I believe, Mr. Kolstad, in some of the other——

Mr. Wiggenhorn: Just a minute, just a second. I am sorry I forgot to introduce this exhibit. I apologize, Mr. Galles. Defendant offers in evidence Defendants' Exhibit No. 8.

The Court: Any objection?

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 8, being statement showing breakdown of classifications for jointly owned tract above referred to, was here received in evidence.)

Mr. Wiggenhorn: May it be shown to the jury?

The Court: Yes.

Mr. Wiggenhorn: We also offer in evidence Defendants' Exhibit 10.

(Testimony of Clarence A. Kolstad.)

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 10, being overlay map of jointly owned tract above referred to, was here received in evidence.)

Q. (By Mr. Galles): With reference to the improvements on some of the other ownerships, I believe you stated you included the value of the improvements in the land prices. Did I misunderstand you, or is that what you said? [202]

A. Well, I never changed the value per acre.

Q. Did you treat this last batch of improvements, which you said were worth \$8,000, the same way as you treated the others?

A. Yes, I didn't add them to the acres. I left the acres at even money.

Q. In effect, the improvements are included in your valuation, or else I misunderstand you?

A. Well, I guess you just as well call it that. I didn't figure them in the acres. I figured the acre price the same as where there was no improvements. I threw them in for good measure. They burned up some of them anyway, they didn't like them or didn't want them.

Q. Then, as I understand it, you didn't increase the per-acre value because there were improvements on each of these parcels of land?

A. That's right.

Q. Mr. Kolstad, allotment acres are fairly im-

(Testimony of Clarence A. Kolstad.)

portant in determining fair market value of wheat lands, are they not?

A. To a certain extent, yes.

Q. Well, to what extent?

A. Well, that is a pretty hard question to answer.

Q. You mean if somebody is going to purchase a wheat farm, he is naturally going to want to know how many allotment acres there are that he can farm and produce wheat on, is [203] that a fair statement?

A. Yes, it is.

Q. So it has a bearing on what a prospective purchaser would consider in paying for a given wheat farm?

A. Yes.

Q. What are your allotments for each of these three parcels? Will you start with the parcel you own in your own name?

A. I believe I have broken them down so far I will have to do some adding. I broke them down into the taking area and out of the take.

Q. How much work is it to add those together so you can give us the total before the taking?

A. The total of the entire farm before the taking?

Q. That is of the farm that stands in your name only?

A. I am not going to be able to give them to you offhand like that because I have got them cut down too far.

The Court: Let me ask this question, just to

(Testimony of Clarence A. Kolstad.)

speed it along. Did you have an allotment for just the land you own?

A. Certainly. Every piece of land carries its own allotment.

The Court: Every piece. Proceed.

Q. By every piece, you mean you had one allotment for the land that stood in your name and a different allotment for the land that stood in Mrs. Kolstad's name, and a third allotment for the land that is in your joint names? [204]

A. If you go into the allotment office, you can make them dig deep enough to give you the actual allotment for any parcel of land you want.

Q. What do you mean by parcel?

A. Any piece of land, 180 acres, 160 acres, 40 acres, but when it is farmed as a unit, the whole thing is thrown into one, and then you are prorated, your acres are prorated accordingly. It is quite a job.

The Court: That is the question I asked. Did you have a particular allotment for the land you own?

A. It carries a particular allotment, yes.

The Court: What is it?

A. I will have to pull it out of here. I think I have got it here. 800.8 acres.

Q. That is for the before the taking, the entire ownership standing in your name alone, just so we are speaking of the same thing?

A. No, that isn't all of it. I guess I have got it segregated——

Q. I wonder if this is going to take some time?

(Testimony of Clarence A. Kolstad.)

A. If you really want it and want it right, I will have to add it up separately. You want it for all three pieces? I got this out of the Allotment Office. I segregated it down to north of the river, south of the river, and north of the creek so I could get all the pieces straight.

The Court: Tell me this, how do you get notice of your [205] allotment?

A. From the Allotment Office.

The Court: Did they send you a notice?

A. Certainly.

The Court: Do you have that?

A. Sure, the entire farm has a 1957 approved base for factoring allotment of 4,074 acres. Then they break that down into the total amount of allotted acres and the allotted acres was 4,358.8. That is over the whole area you farm.

Mr. Wiggenhorn: I think I can explain this. I have had some experience in trying to run some farms myself. I do understand, however, that when, for example, a man owns a piece of land, he may farm another one belonging to someone else. He can transfer that. He can plant on acres, if he wishes, that are his own, or the rented place, as long as you don't exceed the amount allotted to you. It is interchangeable. That is what makes it unimportant to which fraction it is allotted to. You can put your wheat into any acres you wish.

Witness: There was 9,200 acres under the unit. I went in the allotment office and got them to break it down to get to where I could get away from the

(Testimony of Clarence A. Kolstad.)

one place, or to get the acres allotted to me to Mrs. Kolstad, and I have got them all here, but we have to add them up.

Q. (By Mr. Galles): Would it be easier if you told us how [206] many cultivated acres you had for which you had no allotment?

A. I don't know that, offhand.

Q. You did have some plowed land for which you had no allotment? A. Yes.

Q. In other words, your plowed land exceeded your allotment? A. Sure, everybody's does.

Q. How much does yours?

A. I couldn't give you the percentage at all.

Q. Are you able to figure it so you could tell us how many acres?

A. Sure, I think I could arrive at it. It will take a little calculating. You have to add up a lot of acres.

Q. Well, Mr. Kolstad, what you classed as breaking on these maps was just recently broken, in fact, within a year or two, it has been just plowed up?

A. 1954.

Q. And you have received no allotment for the land you broke up in 1954? A. No.

Q. And, of course, you plowed it up after you knew the dam was going in and the land was to be taken and flooded?

A. I didn't know what land was to be [207] taken.

Q. You knew the dam was going in and certain land would be flooded in your neighborhood?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Mr. Galles: I don't know what is the best way to get the allotted acreages and the acres cultivated for which he has no allotment. I would like to save as much time as possible.

The Court: Do it anyway you want to.

Mr. Galles: I don't know whether a recess would shorten the time for Mr. Kolstad—how long would it take you to get that, Mr. Kolstad?

A. Probably 15 minutes to half an hour if I had an adding machine here.

Mr. Wiggenhorn: I wonder if you could defer that and go on to something else?

Mr. Galles: Yes, I can.

Q. (By Mr. Galles): I want to make reference to your average production, Mr. Kolstad. You stated it was 22 bushels to the acre for the harvested acres or planted acres?

A. Seeded acres, yes.

Q. And, of course, attributing production to all of the cultivated land, you have to divide that by two in order to determine what the production was for all of your land under cultivation?

A. Yes. [208]

Q. Now, what farms that you have under operation did you include in that average? Did you include any beside the three tracts you have described here?

A. No.

Q. Do you farm other lands?

A. I oversee it.

Q. Oversee it?

A. Yes.

Q. Is that land owned by your sons?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Q. You didn't include any of their production in the average you have determined?

A. No, no, that is theirs. It was sold under their name.

Q. This was only production you got from these three pieces and sold under your own name or Mrs. Kolstad's? A. Yes.

Q. Now, what was the—do you remember some of the years, the averages of your production? By that I mean how many bushels to the acre on some of the low years? Can you recite those for the past seven or eight years?

A. Not from memory, no.

Q. Do you have those someplace?

A. Yes, I have some records here.

Q. Was part of that based upon the time you had it leased to somebody else? [209]

A. Yes.

Q. And was that to the Mizner Brothers?

A. Yes.

Q. Did you say they had it under lease for five years? A. Yes.

Q. That was all of the land you have testified to, whether in your name, Mrs. Kolstad's name, or jointly? A. That's right.

Q. As I understand it, when they had it leased, they broke up considerable sod? A. Yes.

Q. How much of this cultivated land is what we call old land, that is, land that is not recently cultivated?

A. Well, when they broke that up, that is 10

(Testimony of Clarence A. Kolstad.)

years ago, that would kind of be old land now, wouldn't it? What do you mean, land besides what they broke?

Q. What years did they have it leased?

A. From 1947 through 1952.

Q. And did they break up all that was broken up during the first year they had it?

A. Mostly the first year, and partly the second.

Q. How much did they break up while they had it?

A. Oh, I imagine about 3,000 acres or some such amount. It might have been a little more than that, too. I don't know unless I would add up the various fields. [210]

Q. Now, is it true that you get better production out of new cultivation than you do out of land that has been cultivated, say, for 20 years?

A. I didn't find any difference.

Q. You didn't find it in your case?

A. There might be a shorter crop the first year of breaking if it happens to have been a dry year. It won't hold moisture as good.

Q. But following the first two or three years, you don't think you get better production out of new land broken than older land?

A. I can't see any difference. It would be pretty fine if there was.

Q. Now, I believe you stated what you took into consideration in arriving at the values you have testified to, that is, what elements go into determining fair market value. What were those again?

(Testimony of Clarence A. Kolstad.)

A. Oh, I said that if it was blocked properly in large fields, it made it more economical; and if it was close to market, and not 30 or 40 miles away from the railroad, it had better market value, and the amount of production entered into it.

Q. Well, now, on Exhibit No. 10, the black portion is all that you have ever cropped on this particular piece of land? A. Yes. [211]

Q. You would consider this properly blocked, or a good blocked piece of property?

A. That is a nicely blocked farm, yes.

Q. The only farm land you have there is a little bit up here in the north portion (indicating)——

A. A hundred or two hundred acres.

Q. ——that isn't properly blocked or of sufficient size to be of much value as wheat land?

A. No, but it can be, the rest of it can be broken up.

Q. This can be broken up (indicating)?

A. Yes, it is all tillable.

Q. You would consider this piece in Sections 2 and 3 I am pointing to now, which are both red and black, would be a nice block of wheat land?

A. Well, it would be fair, yes. Not a nice block. A nice block of wheat land is three or four thousand acres.

Q. I appreciate that. So that north of the river here (indicating), you didn't have any except the portion I am pointing to in Sections 2 and 3 that were anywhere near what you might call a block of farm land? For instance, in Section 9 on the left

(Testimony of Clarence A. Kolstad.)

hand side, that couldn't all be farmed, could it, that you have colored red?

A. Certainly it could, it is all level land.

Q. How would you get, say, from this piece to this piece (indicating)? [212]

A. It isn't that rough, it is just too rough to farm. You can drive cars over there.

Q. Now, would it pay you to farm this little piece in Section 10 (indicating), being disconnected from the larger piece in Section 9?

A. Possibly not, but it would work in with what is under your finger there (indicating).

Q. Do you think somebody on the market would come in and pay you 80 or 90 or 95 dollars for this two or three or 10 acres of cultivated land if he were determining what to pay for your whole unit before the taking?

A. Well, he possibly wouldn't, but it would all average out. I took the average. When you take a piece of tillable ground, you have to take the good with the bad, don't you?

Q. Sure. Well, then, you say, he would pay probably more than 90 or 95 dollars for this land here (indicating), he would pay more for that than he would for some of these little pieces here (indicating) that are five or 10-acre tracts?

A. I think so, yes, I would concede that.

Q. Well, how much more? What would be the highest price of tillable land, that is, sod that hasn't been broken, but is capable of cultivation?

A. If we allow 25 to 30 dollars difference be-

(Testimony of Clarence A. Kolstad.)

tween that and cultivated land for the breaking it out, picking a few [213] rocks and getting it into production.

Q. Your highest figure is \$125 an acre for cultivated land? A. Yes.

Q. Then, on that basis, why the highest figure would be 90 or 95 dollars an acre for the tillable, for the best tillable land?

A. I think 95 or a hundred was what we had on the best tillable land.

Q. For the best tillable? A. Yes.

Q. Other land isn't as good because of the arrangement, that is, sharp corners, crooked turns, that wouldn't be worth \$90 an acre?

A. I don't think I valued it at \$100 an acre, did I?

The Court: Let me suggest this, Mr. Kolstad, don't worry about what you think counsel is asking you about. Just answer his question. He just asked you a question, just answer it and don't try to interpret what he has in his mind, just answer the question. Then, after you answer it, if you think you should say something different to explain, go ahead and do it, but first answer the question. Proceed.

Q. We will get specific, Mr. Kolstad. On this joint ownership, in Parcel No. 10, according to the summary sheet, Exhibit 8, you have got before the taking 1,754.48 acres of tillable land at \$95 an acre. Do you find that? [214] A. Yes.

Q. All right. Now, that 1,754 acres of tillable

(Testimony of Clarence A. Kolstad.)

land is all the land shown on this exhibit in red, is that right? A. Yes.

Q. So that you have attributed a value of \$95 for each acre shown in red on this map?

A. Yes, on the north side of the river.

Q. Well, now, I think that that 1,754 acres is all tillable land, whether on the north or south?

A. I know, but you asked me if I put \$95 on all the tillable land.

Q. Well, did you? A. Before taking?

Q. Yes. A. Yes, I did on the 1,754 acres.

Q. Well, now, are you trying to say that some of the tillable ground north of the river is of a different value than that south of the river?

A. Well, I lowered the value on all land south of the river because it is lighter soil.

Q. Then, the value of the tillable land south of the river is worth less than \$95 an acre, if I interpret what you are trying to say, and the tillable land north of the river is worth more than \$95, is that what you want us to believe?

A. It has a difference in value. There isn't any tillable [215] land over there, only two or three hundred acres of tillable land on the south side.

Q. How much do you think it is worth considering the shape it is in and the type of soil?

A. I just roughed it off at \$95. If I was going to classify every acre and put a value on every 40 acres, it would get tedious. I just bunched it.

Q. You are willing to let it stand that you think

(Testimony of Clarence A. Kolstad.)

it is worth \$95 an acre for the red portion of your joint ownership as shown in Exhibit 10, \$95 an acre?

A. Yes. I think when I measured it off, all those edges were knocked off, all the blocks were measured to arrive at 1,700 acres.

Q. What do you mean by that?

A. That map was drawn from an aerial map and it more or less followed the contour of the land.

Q. This 1,754 acres is accurate, isn't it, for the tillable land in this joint ownership?

A. I wouldn't say it was completely accurate. That is hard to arrive at exactly accurate. I measured all this land, what was fit to plow, that was tillable, going over the land, and I have used my figures from that more so than I used from the map showing all the necks in there. They were discounted.

Q. Well, now, Mr. Kolstad, what I would like to get cleared up is fair market value. Of course, fair market value is what [216] a willing buyer will pay and a willing seller will sell for on the market after fair negotiations, and neither being forced to buy or sell. Do you agree with that?

A. Yes.

Q. All right; what do you think, looking at this joint ownership shown in Exhibit 10, a willing buyer would come in and pay, and a willing seller would be willing to accept, considering where the tillable land is located, and the river bottom and the cultivated land, and the grazing land? Now, cer-

(Testimony of Clarence A. Kolstad.)

tainly, he wouldn't pay on the basis of what you have done here, at least I think you will agree with me, by adding up the number of acres of each classification, arrive at a total and say that is what he would pay? Have you ever heard of a buyer arrive at what he would be willing to pay for a piece of land in that manner?

A. Well, perhaps not, perhaps they don't get that technical but when you go to classify land, how are you going to do it if you don't classify it?

Q. What we are after here is what a buyer is willing to pay for a piece of land located as this is with the different types of land in the locations in which they are, and as it applies to this land; what is he willing to pay? He is not going to end up paying on the end \$81.70. Most of the time it is rounded out at \$150,000 or \$25,000 for land, including all kinds of land, isn't that correct? [217]

A. Yes.

Q. And, as a matter of fact, they don't sit down and break it up by cultivated land or grazing land, and how much each is worth, and then extending them out and arriving at some figure which is in odd dollars and cents. They just don't do that as a practical matter, do they?

A. Yes, they do. When you go to sell land, you break it down. You even consider improvements.

Q. Yes. I think a buyer would probably say, "There is 1,754 acres I might be able to cultivate eventually. I won't be able to get a wheat allotment on it, but I can raise some non-allotted grain on it.

(Testimony of Clarence A. Kolstad.)

It is kind of scattered all over the whole tract. Now, I am not going to agree to pay the full price per acre for that as compared to a nice, square block, all level land that can be cultivated or that already is cultivated and for which you have an allotment." Isn't a reasonable buyer going to think in those terms?

A. Yes, but there is an allotment on that place.

Q. Yes, sure, and that is what you are going to figure out during the recess; how many acres of allotted, and whether it is going to pay anybody to even consider plowing up this tillable land, and whether or not it would be worth paying \$95 an acre for it if you couldn't plant any wheat on it. You will figure out the allotted acreages, anyway?

A. I will figure it out for you, yes. [218]

Q. Now, let's see, Exhibit No. 7 is the land that stands in the name of Mrs. Kolstad alone?

A. Yes.

Q. And that is shown here by classification and color as you have divided it. Now, again we have this tillable land, and I think on that summary you have given a value of \$90 for 1,134 acres, 1,134.99, 1,135 acres of tillable land before the taking, and that those large number of acres are, of course, scattered as indicated on this plat?

A. That's right.

Q. And this tillable, it has not been cultivated, and, of course, there is no allotment for that part?

A. No.

Q. There is an allotment for the black portion

(Testimony of Clarence A. Kolstad.)

shown on the map? A. Yes.

Q. And as an expert witness on land values and what land will sell for on the market, what have you to say about the shape of these tillable lands, and the sharp corners and long narrow fingers, that isn't too attractive to a prospective buyer, is it?

A. I may have gone too far in putting the fingers in. A lot of them are shallow coulees you can go right through. I shouldn't have put them in there. I didn't think it would disturb anybody that way [219]

Q. I am not being disturbed any. We are trying to find out what will this piece of land, what would it have sold for on the market on May 24, 1955, under ordinary conditions as I have previously stated.

A. That is exactly the value I put on there. Had the dam not been built, and had the land been offered for sale at that price, it would have been picked up over night.

Q. And you base that on these figures you have in your summary, so much an acre on such and such type land, and so much per acre on this type, and so on, and you think a buyer would add up the value of the different acreages and different classes of acreages here and agree to pay that price?

A. Well, maybe a buyer with your attitude would just look at the total and take a look at the land and never bother about classifying it and come out and say yes, he would take it.

Q. Oh, on this particular piece of the property,

(Testimony of Clarence A. Kolstad.)

the cultivated land and the land that you have an allotment, a wheat allotment on, is broken up and was broken up, but a mile or two between we have smaller tracts, isn't that true? A. Yes.

Q. So that wasn't—your plowed land of 1,666 acres is not all in one piece, but laid in a half a dozen different pieces of quite irregularly shaped tracts?

A. I think they are pretty well blocked. A lot of them are [220] a mile long, some of them are half a mile long. That is not unreasonable for wheat fields.

Q. A mile is four squares?

A. Four squares.

Q. This is a mile long (indicating)?

A. Yes. There is another one up at the north end that is a mile long.

Q. And then this is several miles long (indicating)? A. Yes.

Q. This piece on the right-hand side (indicating), but it is narrow? A. Yes.

Q. Oh, I think it is on this land that you valued 12 acres of alfalfa at \$150 per acre. Well, now, is such a small tract of alfalfa worth that much per acre?

A. That isn't where it is, it is up there by the well (indicating).

Q. Right in here (indicating)?

A. Right there. I was just experimenting with water with that. I took and planted alfalfa there to see how it would come out. It happens to be there, and that is it.

(Testimony of Clarence A. Kolstad.)

Q. Do you think a 12-acre tract of alfalfa is worth \$150 an acre?

A. Certainly, alfalfa isn't figured at the same value as wheat. After all, there is ditches and small acreages, and [221] you farm it in small acreages. Twelve acres——

Q. How many pieces in the 12 acres?

A. There is three or four ditches in it. It is all in one piece, but if you go to mow it, you have several pieces of hay to mow. It isn't all mowed in one piece.

Q. You say the size of an alfalfa tract doesn't make too much difference in the price per acre?

A. I don't think so as long as it is handy. This happened to be right by the house where our equipment was.

Q. Let's see, now, this Exhibit No. 5 is the land owned in your name alone, and, of course, the same is true here that for the portion colored in black, why, you have at least a certain allotment for the wheat acreage in that? A. Yes.

Q. But there are no allotments for these smaller red pieces that you consider tillable and could be put into production, there is no allotment for that?

A. No.

Q. Is there any prospect for such allotment?

A. Certainly, you can get an allotment anytime. You might have to store wheat two years, maybe three, under bond, and you automatically work into an allotment, and if you have a wheat crop less than 20 acres, they give you that allotment.

(Testimony of Clarence A. Kolstad.)

Q. A prospective buyer——

A. He doesn't want to farm without any allotment at all. [222]

Q. He isn't going to put in too much money for tillable acreages just on the prospect of perhaps getting an allotment in the future?

A. They are doing it. Lands are being bought for a lot more money than I am putting on this.

Q. Do you have any particular sale in mind?

A. I have state sales that went up as high as \$150.

Q. That is where there was competition between neighbors, wasn't it?

A. Yes. Competition is what makes us go, our free enterprise system. If we didn't have it, it wouldn't have any value at all.

Q. It was a pretty small tract of land?

A. I don't remember now, it was a half section or a section.

Q. Yes, I knew of that sale, too.

A. I knew you did. I was trying to be fair. I was giving you a medium price. I wasn't putting it away up at the highest sale ever made.

Q. Well, now, what are—you say you are familiar with sales in the area. As long as we are on this subject, what is the lowest per acre sale you know about of cultivated land? A. Cultivated land?

Q. Yes, within a year or two on either side of the date of taking? [223]

A. You mean tillable land or cultivated land?

(Testimony of Clarence A. Kolstad.)

Q. Plowed land.

A. I think there has been some for 60 or 70 dollars, small tracts, isolated tracts, no complete units, nor was this state sale a complete unit, it was just an isolated tract.

Q. So, there are some low sales about the time of the date of taking here as well as high ones that you know about? A. Certainly there was.

Q. Isn't it true that some of the high sales that you know about had practically all of the land cultivated, it was nicely blocked out—in fact, that \$135 an acre sale, I think I know of that sale, too, that was a nice block of farm land with very little grazing land on it, isn't that right?

A. Just a small amount of grazing.

Q. It was a nice, rectangular piece where the operator could go for three or four miles without stopping?

A. I didn't put that much on my good land that is very comparable to it. I only put \$125 on it.

Q. And, of course, this in your land that you own yourself, you say you have 2,551 acres of plowed land, and you have—of course, you will determine whether you have an allotment for all of that and whether a crop can be grown on all parts of this black land. Now, this size farm is certainly an economic unit, isn't it?

A. It just comes under it. [224]

Q. You think 2,500 acres of cultivated land is the smallest a farmer can make a reasonable living on? A. With any degree of efficiency.

(Testimony of Clarence A. Kolstad.)

Q. Well, maybe that is where we are apart. You mean in order to make a lot of money you have to have 2,500 acres of land, cultivated land?

A. I wouldn't put it that way. You won't make a lot of money on it if you are going to have a reserve built up, a little money in the bank to tide you over the lean years. They aren't all the same. I think with the present price of machinery, you can't buy a set of equipment and keep going on very much less than that, if you are going to raise a family, educate children, and live like you or any other person does.

The Court: I think it's time for a recess. (Jury admonished.) Court will stand in recess until 4:20.

(10-minute recess.)

Q. Mr. Kolstad, you mentioned cattle operations, your place being well suited for cattle. Do you have cattle now?

A. No. After I got the lease back, I never restocked. I knew the dam was coming in and I didn't restock with cattle.

Q. Then you didn't have cattle while the lease was in effect, either? A. No.

Q. The lease started in 1947? [225]

A. Yes, the fall of '47.

Q. Did you have cattle before that?

A. Sheep.

Q. Well, now, you know the livestock business, then, I take it. How long were you in the sheep business?

(Testimony of Clarence A. Kolstad.)

A. Not very long. I am not an expert on cattle and sheep. I wouldn't try to qualify as knowing much about it. We have had cattle off and on on our farm, but in the last few years, I didn't, well, the last almost 10 years I haven't had any stock.

Q. Well, then, when you testified about the use of your land for livestock operations, you don't know what it would handle, how many catttle?

A. I saw them have cattle on it when it was under lease.

Q. Do you know how many acres it takes to support a cow for a full year?

A. We figure about 30 up there, between 25 and 30. If you go down in the bottoms, there, it is a lot less, but on the average grazing acres, we figure between 25 and 30.

Q. That is the average for both bottoms and upland?

A. No; if you are using the bottoms for wintering, it will drop it down to, maybe between 15 and 20.

Q. And then by a mathematical process, of course, you could figure out how much it would cost for that 15 or 20 acres. Now, I think you stated across the board on this land, you [226] figured, well, on one of them, that is, on Mrs. Kolstad's that I happen to see here, \$75 an acre across the board. Well, \$75 an acre times 15 acres, to take the lowest number, 15 acres to support a cow, if I multiply right, that comes out \$1,125 for the cost of a cow

(Testimony of Clarence A. Kolstad.)

for a year, I mean, the cost of a home for a cow for a year. That is one way of putting it, isn't it?

A. Well, of course, when you figure your grazing in there, you also figure it into the unit, you have got your stubble, you have got your straw. It all adds into taking care of a cow and makes your grazing a little more valuable.

Q. Yes. Now, you mentioned—oh, and do you know what cows were worth about May 24, 1955, an average-size cow, of what, a thousand pounds?

A. I wouldn't remember the market then. I wouldn't want to guess, I imagine about 200 to 250 dollars.

Q. Well, then, confining it to the upland grazing on which you put \$20 an acre, I believe, and you say it takes from 25 to 30 acres of land to support a cow for a year of that type of land——

A. That is about what the College at Bozeman figures on pamphlets I have seen covering this area.

Q. And as an expert on land values, which you profess to be, don't they figure that you can pay for an animal unit in purchasing a farm or a cattle operation about what a cow [227] would bring on the market, isn't that a fair rule of thumb?

A. Certainly it is.

Q. Then, your \$20 an acre, because you don't farm it, it is good only for the cattle operation, figuring 25 acres, we will take the lowest figure, is \$500 for that, for the cost of the home for a cow for a year, when you agree with me that it should be down around \$200, which is the price of the cow.

(Testimony of Clarence A. Kolstad.)

A. You are trying to take this apart all the time. If you take the grazing land alone, put it out by itself, maybe it don't have that value. Connect it with the rest of the place, it has more value.

Q. You are the one that started breaking it down, you see, by so much an acre.

A. How else was I going to arrive at it. If you want it the other way, I will give you the total over-all price.

Q. That is what we want.

A. I gave you the over-all price for the entire place.

Q. But you got that by breaking it down and adding the value of the component parts, didn't you?

A. It was my way of doing it, certainly.

Q. And that is what you did in arriving at your valuation, but you now don't like the way I am tearing it apart when questioning you about an animal unit. I am trying to show that is not a proper way to do it under good appraisal [228] practices for fair market value. Now, on which tract, Mr. Kolstad, is the artesian well; is that owned by you or Mrs. Kolstad, or jointly?

A. Mrs. Kolstad.

Q. And, of course, that you say is good for a cattle operation, and particularly winter, because it is warm water?

A. Right.

Q. Can you use that water for irrigating?

A. I was using it, I was using it on that 12 acres of alfalfa, trying it out, seeing how it would work.

Q. How did it work?

A. All right.

(Testimony of Clarence A. Kolstad.)

Q. It had sufficient mineral content, coming from a depth of 2,200 feet, to be good irrigating water?

A. Well, I sent a sample in to Helena, to the State Sanitary Board, isn't it, and also the Live-stock Commission, and on into the Bozeman State College. They passed on it for stock water and irrigation water, and for human consumption, if you could take it. There is a little sulphur in it.

Q. It would be good for human consumption for anybody that liked a little taste of sulphur in it?

A. Strong sulphur.

Q. But, as you stated, I believe, that artesian well is still on the remaining property? [229]

A. Just over the line.

Q. And can be used in conjunction with the same purposes except for the irrigation of that alfalfa down below which you no longer own?

A. All the land below which was not taken, or which was taken was subject to irrigation.

Q. When you say subject to irrigation, where would you get the water to irrigate? Would you take it all from this artesian well?

A. Well, I have talked with various people that figured it would have irrigated possibly 100 acres with the output from the well.

Q. Did you have water rights in the Marias River?

Mr. Wiggenhorn: Just a minute, we object to that because unless it can be shown the stream is

(Testimony of Clarence A. Kolstad.)

adjudicated, to speak about having water rights in the river is a matter of priority entirely.

The Court: He is asking.

Mr. Wiggenhorn: I submit the question can't be answered. He should ask if it had been adjudicated.

The Court: Overruled.

A. I don't have any rights. I always used all I wanted and nobody ever stopped me.

Mr. Wiggenhorn: Ask that the answer be stricken because the question is an improper question. Whether a man has rights, [230] water rights, everybody has rights——

The Court: He says he doesn't.

Mr. Wiggenhorn: That is what I object to. He said he doesn't, but it isn't established it has been adjudicated.

The Court: This is cross-examination.

Mr. Wiggenhorn: I realize that. When you ask a witness if he has water rights and he says he hasn't, he is telling the exact truth when the stream isn't adjudicated. When the stream is not adjudicated, it is entirely immaterial whether he has a right or not.

The Court: Overruled.

Q. Mr. Kolstad, with reference to the land owned in your own name, it shows before the taking in your Exhibit 6, 2,551 plowed acres. How much of that was just recently plowed up?

A. In this 2,551?

Q. Yes.

A. Gee, I wouldn't know, unless I looked at the

(Testimony of Clarence A. Kolstad.)

breakdown. I can get it broken down. There is too many acres here, I can't rightly offhand say how many acres in this amount was old ground and how many was new.

Q. Can you recall about what percentage was just recently broken?

A. It would be 10 or 15 per cent.

Q. So, it would be 250 or 375 acres that was just recently broken on the land owned by [231] you?

A. Well, possibly two or three hundred acres.

Q. How about on the land owned in Mrs. Kolstad's name, of the 1,666 acres before the taking of the plowed land?

A. There could be two or three hundred acres there, too, approximately.

Q. It would be more than 10 or 15 per cent of that?

Mr. Wiggernhorn: Object to the question. It is a matter of computation.

The Court: Overruled.

Q. That would be more than 10 or 15 per cent, two or three hundred acres out of 1,600 acres would be——

A. Twelve and a half per cent, wouldn't it, twelve and a half?

Q. Anyway, it was about the same number of acres recently plowed out of the 1,666 acres as it was out of 2,500 acres in your own land?

A. Approximately, yes.

Q. And then, on the jointly held land, there is

(Testimony of Clarence A. Kolstad.)

1,560 acres of plowed land before the taking. How much of that was newly plowed?

A. None. I think that is all old ground.

Q. And when you say recently plowed, or when I say recently plowed, that means in 1954?

A. Probably some in 1953 and some in 1954, late in the fall of 1953. Whenever we had spare time, we would break out a [232] little of it and work it in with the old ground.

Q. What did you plan to do with that land?

A. Farm it; I had it in durum.

Q. You could have raised durum on all of the newly broken stuff under the law?

A. I did the last two years.

Q. Now, I am about through with this. Do you have your figures ready on the allotted acreages?

A. No. I thought you wanted them in the morning.

Mr. Galles: It means that we will have to call you back to the stand for further cross-examination, which is all right with me.

The Court: Do you think you are just about through with him, otherwise?

Mr. Galles: Yes.

The Court: I suppose the better thing to do would be to recess until morning, then. I think it is a little more convenient for everyone.

Mr. Wiggenhorn: I would suggest we do not call another witness.

The Court: Well, then, we had better recess until morning. I would just like to make sure that

(Testimony of Clarence A. Kolstad.)

Mr. Kolstad understands what figures you are calling for now so it will be clear so it will be done in the morning.

Q. (By Mr. Galles): Mr. Kolstad, I would like to have you [233] compute from the figures you say you have and from the records you say you have the allotted acreage, broken down into each of your ownerships, each of the three ownerships here. You understand what I mean? A. Yes.

Q. So we can determine how much of the plowed land in each case you don't have an allotment for on each of these tracts. A. Yes.

Mr. Wiggenhorn: May I ask a question before we adjourn?

The Court: Yes.

Mr. Wiggenhorn: I am sure I overlooked offering some pictures as I did in the Clarence Kolstad case. I see I did neglect to offer and mark them in the Alta and jointly owned land cases.

The Court: Why don't we do that now?

Redirect Examination

By Mr. Wiggenhorn:

Q. First of all, these I am showing you, Mr. Kolstad, are those ones taken on the Alta Kolstad place? A. Yes.

Q. I hand you what has been marked as Defendants' Exhibits 11, 12 and 13, respectively, and will ask you whether those are pictures taken under your direction on the Alta Kolstad [234] place?

(Testimony of Clarence A. Kolstad.)

A. Yes, they are.

Q. And when were they taken?

A. In the fall of 1956.

Q. And will you, starting with Exhibit No. 11, identify that, where it was taken, and what it represents, what it illustrates?

A. On the map?

Q. Well, I am not going to bother——

Mr. Galles: I would like to have it shown on the map. I think if the witness would mark in the number of the exhibit, approximately where each number was taken.

Q. It would better identify it if the area of ground or territory that this picture represents was shown rather than the point from which it was taken. Will you do that?

A. This one, this picture was taken right along here (indicating).

Q. Exhibit 11. You are now pointing to maybe about the middle of the southeast quarter of Section 30, are you?

A. Well, it was in that area is where it was taken.

Q. Looking in what direction from the camera?

A. Looking to the east.

Q. Looking to the east, is that your answer?

A. Yes.

Q. It shows what? [235]

A. Wheat.

Q. And that was taken when?

A. Just before harvest, right in harvest.

Q. Of 1956?

A. 1956.

Q. Now, let's take the next exhibit, No. 12.

(Testimony of Clarence A. Kolstad.)

A. Twelve would be right along, right along——

Q. You are not looking at 12, you have 11 in front of you there now.

A. I meant to put the other away. Right in here some place (indicating).

Q. You are now pointing to a place about——

A. Between Sections 29 and 32.

Q. And on the center line between Sections 29 and 32——

A. It was taken facing south.

Q. And that would be what kind of ground depicted there, is that wheat or stubble, or what is it?

A. It is stubble, but wheat is where the combines are.

Q. In the distance or background, the picture shows, represents wheat, and stubble in the foreground?

A. Yes.

Q. And the combines are shown in the wheat, is that right?

A. Yes. This one was taken facing north.

The Court: When you say this one, which one is it?

A. Exhibit No. 13 was taken the same place facing north. [236]

Q. In other words, 12 is facing south and No. 13 is facing north from this point on the line between Sections 29 and 32, is that right?

A. Yes.

Q. And that one shows what, Mr. Kolstad; is that a wheat field?

A. Wheat that hasn't been cut.

Q. Taken at the same time as referred to?

A. The same time.

(Testimony of Clarence A. Kolstad.)

Q. Give us some idea about what the wheat horizon distance would be from the camera—I want to know how big the field is?

A. It runs up there about three-quarters of a mile.

Mr. Wiggernhorn: We offer Defendants' Exhibits 11, 12 and 13.

Mr. Galles: I have no objection, but I think to keep the record straight it should be noted that the witness has marked the numbers 11, 12 and 13 by dots, which, as I understand it, represents the points at which these pictures were taken.

Mr. Wiggernhorn: I agree to that.

The Court: Very well, they are admitted.

(Defendants' Exhibits 11, 12 and 13, being the pictures above referred to, were here received in evidence.)

Q. Now, I am handing you exhibits numbered consecutively [237] 14, 15, 16, 17, 18 and 19, Defendants' Exhibits in each instance, and will ask you to identify them generally as to whether they were pictures taken of land on the jointly owned property of Alta Kolstad and Clarence Kolstad?

A. Yes, they were.

Q. Take them one by one, and starting with number 14 first, and again, as suggested by counsel, let's identify the point from which taken, and mark 14 at that point?

A. It was taken up the road here some place, on the road.

No. 15871

United States
Court of Appeals
for the Ninth Circuit

CLARENCE A. KOLSTAD and ALTA A.
KOLSTAD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 271 to 553)

FILED


JUN 16 1958

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court
for the District of Montana,

No. 15871

United States
Court of Appeals
for the Ninth Circuit

CLARENCE A. KOLSTAD and ALTA 
KOLSTAD,

Appellants,

vs.

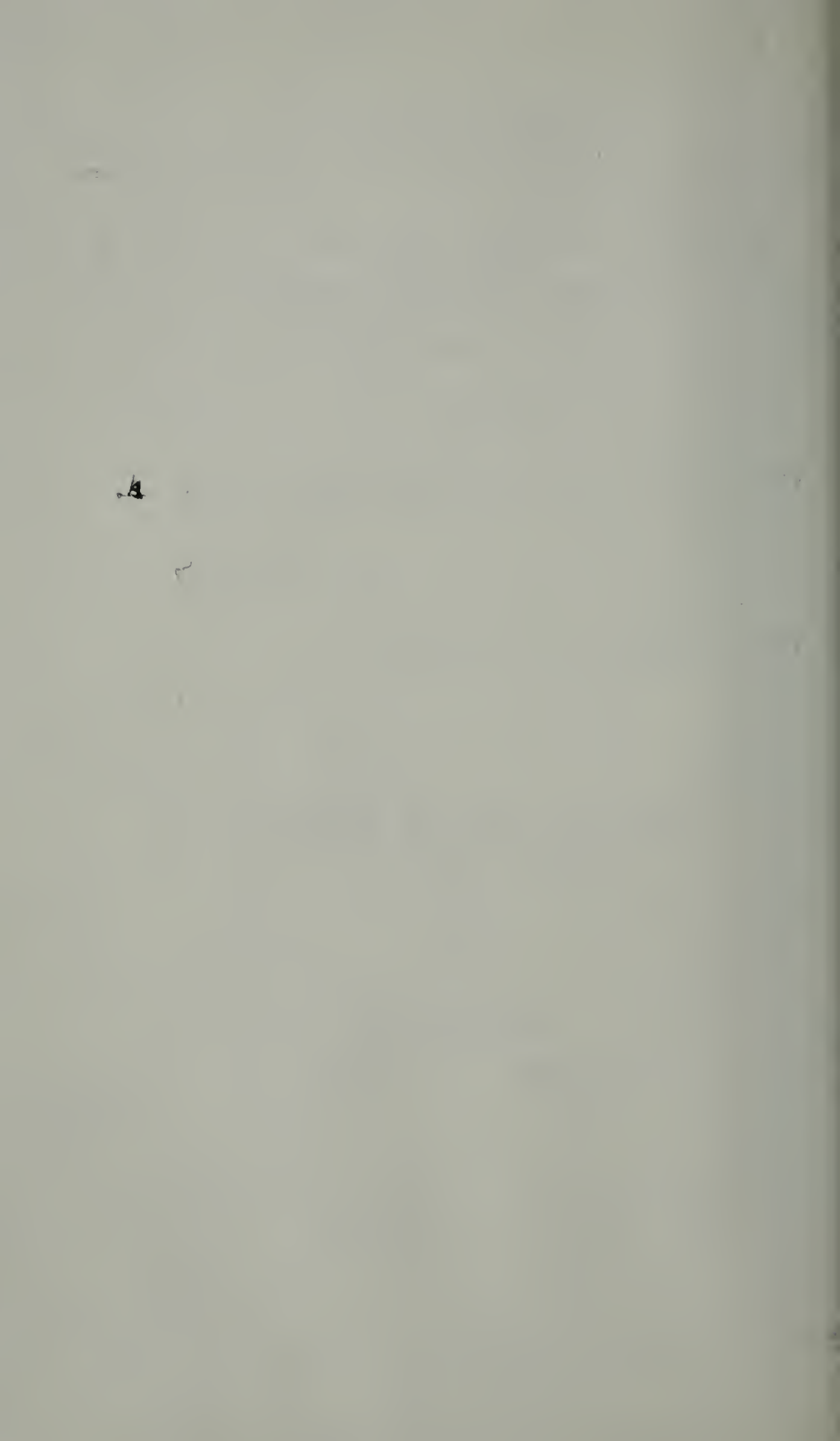
UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 271 to 553)

Appeal from the United States District Court
for the District of Montana,



(Testimony of Clarence A. Kolstad.)

Q. And you have marked 14 there to identify it?

A. And facing south, yes.

Q. Marking that on Exhibit No. 10. Let's identify the direction in which the picture was taken.

A. South, facing south.

Q. And what does that represent or depict?

A. Clear river bottoms, those that don't have brush and trees.

Q. It is looking over the river bottom of the Marias River, is it? A. Yes.

Q. Take the next one, 15, can you mark the point from which it was taken by a 15 on Exhibit 10?

A. It was taken facing west over into a dense river bottom covered with a lot of brush and trees, a wintering spot.

Q. Would you call this a typical river bottom with brush [238] and trees that you spoke of as being valuable for the wintering of stock?

A. No, I would say it was exceptional, the envy of all the stockmen around; one of the best in the Marias River.

Q. It is part of your joint property?

A. It is so good I never cleared it to plant alfalfa on it.

Q. Now, mark 16, please.

(Witness does as requested.)

Q. And you have now marked the point from which exhibit No. 16 was taken on Exhibit No. 10, have you? A. Yes.

Q. What is that?

(Testimony of Clarence A. Kolstad.)

A. It is an alfalfa field.

Q. On the river bottom, is it? A. Yes.

Mr. Galles: Facing which direction, still west? It is facing west? I mean you faced west taking the picture?

Q. It looks to the west? A. Yes.

Q. Now, you have marked a dot and No. 17 by the dot on Exhibit 10 to show the point from which Exhibit No. 17 was taken, have you? A. Yes.

Q. In which direction was the camera [239] facing? A. East or northeast.

Q. What does it show?

A. Part of an alfalfa field and more of the river bottom.

Q. In other words, it is all river bottom depicted here, is it?

A. Yes, river bottom clear up to the ridge.

Q. And the next one?

A. Eighteen is taken in the same place, only switched over farther to get the rest of the meadow.

Q. Looking in which direction?

A. North and a little east.

Q. Does it show the Marias River?

A. Right there.

Q. It shows the breaks on the other side of the river and shelter for cattle, does it? A. Yes.

Q. And likewise shows the bottoms in between, does it?

A. Yes. That one was taken facing south.

Q. Now, you have marked upon Exhibit No. 10 another dot numbered 19 on the exhibit which repre-

(Testimony of Clarence A. Kolstad.)

sents the place from which Exhibit 19 was taken, does it? A. Yes.

Q. It was facing south, you say? A. Yes.

Q. What does it show? [240]

A. Alfalfa meadow.

Q. In other words, this light-colored ground below the breaks on here on the other side is alfalfa, is it? A. Yes.

Q. What we see in the foreground here is river bottom, is it?

A. It is just a break from one bench up to the next one.

Q. Where does the river lay here, behind us?

A. No, over along the edge.

Q. Had there been any flooding at the time the picture was taken?

A. No, it was taken in the spring of 1956.

Q. Now, could you tell us—I think—when were these exhibits taken?

A. I think all you have there were taken in the spring of 1956.

Q. What I have here is Exhibits 14 to 19, inclusive? A. Yes.

Q. You think they were all taken in the spring?

A. Yes, I am sure.

Q. You might take a look to be sure you haven't made an error in that.

A. No, because they are all in the bottom. That would be under water in the fall when I took the other pictures. They were all taken in the [241] spring.

(Testimony of Clarence A. Kolstad.)

Mr. Wiggenhorn: That is all I have, your Honor.

The Court: Do you offer them now?

Mr. Wiggenhorn: Yes.

The Court: Any objection?

Mr. Galles: If I may look at them. No objection.

The Court: Very well, they are admitted.

(Defendants' Exhibits 14 to 19, inclusive, being the pictures above referred to, were here received in evidence.)

The Court: Court will stand in recess until ten o'clock tomorrow morning. (Jury admonished.)

(Thereupon, a recess was taken until 10 o'clock a.m., the following morning, January 18, 1957, at which time the following proceedings were had:)

Mr. Wiggenhorn: These pictures that were introduced last night weren't handed to the jury. I wonder if we might pass them to the jury?

The Court: Yes.

Mr. Galles: May we proceed.

The Court: Yes.

Further Cross-Examination

By Mr. Galles:

Q. Mr. Kolstad, you were going to give us a summary of the allotted acres on the three different tracts of land owned either by you or Mrs. Kolstad or you and Mrs. Kolstad [242] jointly. Have you those figures with you now? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. All right, with reference to the land owned by yourself, what is the allotment acreage?

A. We are talking about before taking?

Q. Before the taking and as of May, 1955.

A. Before the taking, there were 658 allotted acres out of the total. I am talking about allotment acres here. We will get all confused because it won't match those you have on the papers. It never does.

The Court: Mr. Kolstad, don't worry about what he has, just answer the questions.

A. Well, out of the total of 2,508.6 in the farm, the allotted acres are 658 acres.

Q. Very well. Now, on the tract owned by Mrs. Kolstad, and would you give the total farm and then the total acres and the allotted acres?

A. The total farm, by that do you mean the total holding?

Q. The total plowed that belonged to Alta Kolstad before the taking. I think you testified it was 1,666.59 acres.

A. 1,631.1 in the allotment measurements, and the allotted acres were 401. The reason for the discrepancy in acres is because the allotment office measures different. We will call 160 acres of plowed ground 160 acres. When they take 160 acres of ground, on every half mile there is a road and [243] they deduct it, so that is where they get fractions and lesser acreage as per government survey.

Q. That is why you gave the total as 2,508 acres in connection with the allotment when you testified

(Testimony of Clarence A. Kolstad.)

yesterday that in your land there was 2,551, a difference of 43 acres?

A. That is correct, that is what we lost in the allotment office, but when selling land with 320 acres of plowed land, it is 320 acres.

Q. I understand. Now, on the Clarence and Alta lands held jointly, yesterday you said before taking there was 1,560 plowed acres. Now, how many?

A. In the allotment figures, there are 1,572. I don't know how they got a larger figure, and the allotted acreage is 412 acres.

Q. Now, yesterday you testified that the average production was 22 bushels from the planted acres?

A. Right around that.

Q. Over how many years is that?

A. About seven years I had records of.

Q. Would that include 1956?

A. I think it did, I believe it did.

Q. So the jury doesn't get the wrong impression, you were farming that under a permit or right of the government to farm that land?

A. I had a lease from the State Fish and Game Commission. [244]

Q. Yes. What was your production per acre in 1949, do you remember that?

A. No, I don't.

Q. That was during the period you had it leased to the Mizner Brothers?

A. Yes.

Q. Isn't it true that it was 12 bushels to the acre on that year as reported to you by them?

A. No, I don't think so. I would have to look at

(Testimony of Clarence A. Kolstad.)

my records. I could look and tell you exactly what I received.

Q. All right, if you have it. Also, I would like to have you get the '52, the '52 production.

A. No, I am sorry about that 1949, because I couldn't get the seeded acres out of the allotment office. They destroyed the records. 1948 and 1949, I don't have a complete record.

Q. You don't have that information?

A. No, I started with 1950. That is the last seeded acre record available in the allotment office.

Q. What was the production in 1950?

A. Nineteen bushels.

Q. Now, that is according to the allotted acres?

A. According to the allotted acres and elevator receipts.

Q. And it was during that time that the Mizner Brothers had it leased and actually operated the farm?

A. Yes. [245]

Q. You don't know whether their production was confined to the allotted acres or whether they had additional acreage planted?

A. There was no allotted acres then.

Q. Oh, I see. All right, now, 1952, what does your production record show?

A. 21.2.

Q. That is bushels per acre?

A. That's right.

Q. And that is off the three places involved in this action?

A. Yes.

Q. That doesn't include the place operated by your sons or any other place?

A. No.

(Testimony of Clarence A. Kolstad.)

Q. All right, thank you.

A. It also doesn't include the seed that was deducted for use. I took these records here strictly from what went over the elevator scales. The stuff that was held back and used for seed was adjusted at the end of the year and paid for, so it would swell it to 22 or so for the year we are talking about.

Q. Did you sell any wheat at the elevator that was produced in a previous year?

The Court: Take the stand, sit up there. [246]

Q. Did you understand my last question?

A. No, better repeat it.

Q. I will ask it again. From your records and the elevator receipts, was any of that wheat that you sold produced in a previous year from the year sold?

A. There might have been a thousand or two thousand bushels hang over, but they were selling their wheat every year as they harvested it. There wouldn't be any appreciable amount. They always keep back a couple or three bins for seed and what was left over from seed was sold the next year.

Q. When you say there wouldn't be any appreciable difference, can you give it in percentage, an estimate?

A. Probably about two or three per cent, not any more, but that is true from year to year. We was always holding over, so it ought to equalize out.

Q. You say the Mizner brothers had this leased for five years? A. Yes.

Q. And they started in 1947? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And when did they get off the place?

A. In 1952, but they cropped—wait a minute, now. Yes, they cropped in 1953, see, they had their summer fallow in 1952, so they seeded and cropped that in 1953.

Q. Did they harvest the crop in 1953, or [247] you? A. They did.

Q. So they went on there and summer fallowed in 1947?

A. No, in 1948, they took it in the fall of 1947.

Q. Then their first year's work was in 1948?

A. That's right.

Q. Did they take crop off any part of it in 1948?

A. Yes.

Q. Then in 1948, they had a crop on part of it?

A. Yes.

Q. And in '50, they had a crop on part?

A. Yes.

Q. And in '51, they had a crop on part?

A. Yes.

Q. And in '52 and '53? A. Yes.

Q. So they took six crops off?

A. That is what it amounts to, and five years of summer fallow.

Q. Yesterday, you stated as one of the bases for arriving at your opinion were some sales at \$135 per acre, and that one was a state sale. Was that the 160 acres of tillable land, that is, not plowed, that was purchased by Kolstad?

A. That was one of them.

Q. And there was another piece of state land

(Testimony of Clarence A. Kolstad.)

sold that same day, 320 acres of tillable land, the same kind of land, at [248] \$50 an acre with the same bidders present, wasn't there?

A. I think so, I wasn't at the sale.

Q. And the other \$135 sale you mentioned you took into consideration, a Kolstad was involved in that sale also?

A. No. When I said \$150 for a piece of tillable land, I was referring to the one in Hill County.

Q. No, I am talking about the \$135 an acre sale you referred to, wasn't that from Kelly Kolstad to Mrs. Ray?

A. You are talking about a farm now?

Q. Yes. A. Yes, I had that in mind.

Q. And both of the Kolstads involved in those two sales you considered are related to you in some way?

A. One of them is a cousin and the other is a brother.

Q. I see. A. Or a nephew, I should say.

Q. This artesian well that you mentioned, that pressure you referred to is a shut in pressure, that is not the flowing pressure, is it?

A. It shows that much pressure on a guage.

Q. When it is shut off? A. Yes.

Q. And when it is fully opened, there is about 27 pounds?

A. I never heard that figure before.

Q. You don't know that, but anyway, when the well is shut [249] off, it registers, what figure did you say, how many pounds?

(Testimony of Clarence A. Kolstad.)

A. 135, that is what the drillers told me at the well. I don't know only what they told me. They knew what they were doing, I imagine.

Q. I want to refer you to Exhibit No. 3, being a photograph, and as I understand it, this is looking north?

A. Yes, it is.

Q. Is there any part of the land of Clarence Knutson shown in this picture?

A. That little chunk of summer fallow right there (indicating).

Q. But all the stubble is yours?

A. That summer fallow is mine, but the stubble the other side is his.

Q. Between what is shown as summer fallow on the left side of the picture and the breaks in the background is the Clarence Knutson tract of 320 acres?

A. Yes, away up at the other end.

Mr. Galles: That is all.

Redirect Examination

By Mr. Wiggenghorn:

Q. On cross-examination counsel pointed out to you that in looking at the maps here, each of these respective three places, I have forgotten which one they then referred to you, [250] but they indicated to you on this map that some of this tillable ground you had classed as tillable was just in small patches and in fingers, I think the expression used was. When you considered that and gave your opinion of the value of the tillable ground on any one of the three places you have testified to, did you take into

(Testimony of Clarence A. Kolstad.)

consideration the fact that it was in some cases small patches? A. Why certainly.

Q. And in making the value, why it would somewhat depend upon the size of the field that is classified by you as tillable as to whether its value is higher or lower? A. Yes.

Q. You were asked yesterday about whether you had any water right out of the Marias River, and I believe you stated you did not have a water right out of the Marias River. Do you know whether or not the rights in the Marias River, the right to the use of water in that river has ever been adjudicated? A. I don't know.

Q. Do you understand, Mr. Kolstad, that in the case of the use of water out of a stream——

Mr. Galles: May I make an objection?

The Court: Wait until he finishes the question.

Mr. Wiggenhorn: It is all right with me if counsel wants to anticipate me.

The Court: Go ahead and ask the question. [251]

Q. Do you understand in the use of water out of a stream by the landowners who can divert water from that stream to their lands, unless the rights have been adjudicated by a court, and by that I mean unless the court has decided the priority in which the water may be used as to time, that with respect to anyone to whom that water is available for irrigation purposes, the matter of right is just a matter of relativity, that is to say, whether first, second, third or fourth, as the case may be.

Mr. Galles: Object to the question, your Honor,

(Testimony of Clarence A. Kolstad.)

as no foundation has been laid that this witness is qualified in legal matters. It is immaterial. I further move the question be stricken and the jury admonished to disregard the implications in the question.

The Court: The objection is sustained, but not because it is immaterial. You have raised the question, but that is a matter of law, that is a matter of law upon which the Court will instruct the jury upon proper request.

Q. I take it, Mr. Kolstad, you don't know anything about the law of water appropriation?

A. No, nothing at all.

Q. Do you know what you said when you said you didn't have a water right?

A. What I thought he meant, you can file an instrument declaring your right in a stream. I didn't have any filed. [252]

Q. Is that what you meant, you didn't have any filed?

A. Isn't there such a thing as an instrument you file to declare your water rights?

The Court: Counsel, I think the matter is perfectly clear. Government counsel raised the question as to whether or not he had any rights. The Court will give a proper instruction if you submit it to the Court with reference to what the law is.

Mr. Wiggenhorn: No further questions.

Mr. Galles: That is all.

(Witness excused.)

RICHARD ALLEN RAY

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schiltz:

Q. Will you state your name, please?

A. Richard Allen Ray.

Q. Where do you live?

A. Chester, Montana.

Q. What is your occupation? A. Farming.

Q. Where is your farm?

A. Southwest of Chester about 18 miles. [253]

Q. How long have you farmed in the Chester area?

A. Oh, I have been actually farming probably about nine years.

Q. Have you been in charge of a farm and operated a farm yourself during that time?

A. Yes, I have been kind of in charge. I farmed it for mother.

Q. Are you acquainted with the lands involved in this case, that is, the lands belonging to Mr. Clarence Kolstad and lands belonging to Alta Kolstad, and to their joint lands?

A. Yes, I have been over those lands.

Q. Can you tell us on a map of Liberty County where—strike that question. Were you and your mother parties to a sale of certain lands in Liberty County to Mr. Kamerzel? A. Yes.

Q. When did that sale take place?

A. April, 1955.

(Testimony of Richard Allen Ray.)

Q. How many acres of land were involved in that sale?
A. 940 acres.

Q. How many of those 940 acres were cultivated?

A. All but three or four, something like that.

Q. Will you show us generally on Defendant's Exhibit No. 2 where the lands that you sold to Mr. Kamerzel are located? Will you mark generally on that map with red pencil where those lands are located? [254]

A. This is a mile here (indicating)?

Q. Yes.

A. Well, it would be right in about here (indicating). Do you want me to draw a circle?

Q. Yes, and then off to the side, can you write "Ray to Kamerzel"?

(Witness does as requested.)

Q. Now, then, looking at the map, I notice you have drawn a circle southwest of Chester?

A. Yes.

Q. About two miles or such a matter?

A. Well, it would be about three or four miles southwest of Chester.

Q. And also, comparing these lands to the Kolstad properties, it would be how far away from the Kolstad property?

A. I suppose it must be around 12 or 13 miles northeast.

Q. Where are those lands located with reference to the Marias River?

(Testimony of Richard Allen Ray.)

A. Well, they would be about 17 miles north of the Marias River.

Q. Where with reference to the Great Northern Railroad? A. Two miles south.

Q. Are you familiar with Cottonwood Creek?

A. Yes.

Q. Where are they located with reference to Cottonwood Creek? [255]

A. About two miles west of Cottonwood Creek.

Q. Do I understand that this particular land that you sold to Mr. Kamerzel had been your farm at one time, I mean you had farmed it, it wasn't a piece you had just owned for a matter of a year or two? A. No, it had been farmed quite awhile.

Q. How long had you farmed it?

A. I bought it in 1947.

Q. You farmed it continuously from 1947 to 1955 when you sold it? A. That's right.

Q. What did you raise on the farm?

A. Wheat.

Q. Spring wheat or winter wheat?

A. Spring wheat.

Q. What was the average yield on that farm while you had it? A. About 13 bushels.

Q. Any improvements involved in the transaction?

A. One granary, that was all there was.

Q. Approximately what was the granary worth?

A. About \$2,000, I suppose.

Q. Was there a crop on the property when you sold it?

(Testimony of Richard Allen Ray.)

A. There was some crop on the summer fallow, yes.

Q. What was the purchase price for the sale of that property? [256] A. \$100,000.

Q. \$100,000 for 940 acres. If my arithmetic is correct, that figures about \$106 per acre across the board? A. That's right.

Q. If you know, how do the lands involved in that Kamerzel sale compare with the Kolstad lands to the southwest?

A. Well, it is not in the winter wheat belt, it very seldom raises winter wheat up in that area. Why, I am not sure, but winter wheat doesn't pan out.

Q. In your opinion, is land which will produce winter wheat more valuable than land that produces spring wheat? A. Yes.

Q. It is a more stable crop?

A. Yes, it always out yields spring wheat if you can raise it.

Q. How many acres of that 940 acres were allotted to wheat? A. 320 acres.

Q. Roughly one-third was allotted to wheat?

A. That's right.

Q. Now, directing your attention to that unit, 940 acres, was that, in your opinion, an economic unit?

A. No, not by itself. That is the reason we sold it. It wasn't large enough.

Q. Were you and your mother likewise parties to a purchase and sale of lands in Liberty County from Clarence J. Kolstad, [257] or Kelly Kolstad,

(Testimony of Richard Allen Ray.)

as he is commonly called? A. Yes.

Q. When did that sale take place?

A. October, 1955.

Q. Now, then, what were the details of that sale, were you purchasers or sellers of that property?

A. We were purchasers.

Q. What were the details of that sale, how did it come about?

A. Well, evidently, Mr. Kolstad, Kelly Kolstad, had contacted a real estate agent and put his place up for sale, and this real estate agent thought we might be interested, and being it was fairly close and he knew we sold our place and wanted to buy some land, a larger place, and he come and contacted us, so when we came to deal——

Q. You closed the deal for the property?

A. That's right.

Q. As I understand, the property sold under contract for deed, or you bought it under a contract for deed? A. Yes.

Q. You made a down payment? A. Yes.

Q. And the papers were escrowed in the bank?

A. Yes, the deed was escrowed and a contract was all put in the bank. [258]

Q. How many acres of land were contained in that property?

Mr. Galles: I will object to that as not being the best evidence since a contract was entered into between these parties. He has a contract.

Mr. Schiltz: He has the contract. Do you want it introduced?

(Testimony of Richard Allen Ray.)

Mr. Galles: I would like to see it, if I may.

(Instrument produced and furnished to Mr. Galles.)

Mr. Galles: I think rather than taking the time to study this, if it is all right, may we put it in evidence?

Mr. Schiltz: I have no objection to putting it in evidence. He can testify to all the terms of it.

Mr. Galles: It would be quicker if he would just put it in evidence. I wouldn't have to take the time now.

Mr. Wiggenhorn: I presume, your Honor, that should the owner of this contract require its possession for some reason arrangements could afterwards be made to substitute a copy?

The Court: Oh, yes.

Q. Now, I hand you what has been identified as Defendants' Exhibit No. 20. If you are familiar with that document, will you tell what it is?

A. This is a contract for deed for this sale from Kelly Kolstad to us of a parcel of land.

Q. That contract bears what date?

A. This has the 14th day of October. [259]

Q. Of what year? A. 1955.

Q. And has it been—does it contain your signature and the signature of your mother as buyers of that property? A. Yes.

Q. And does it contain the signature of Mr. Clarence J. Kolstad or Kelly Kolstad?

A. Clarence J. and Anna M. Kolstad, his wife.

(Testimony of Richard Allen Ray.)

Q. This Clarence J. Kolstad, one of the parties to this transaction, is not Clarence A. Kolstad who is a party to this case? A. No.

Q. He is a cousin or nephew or something else?

A. Cousin, I guess.

Q. Now, then, how many acres of land were contained in that sale? A. 1,880 acres.

Q. Directing your attention again to Defendants' Exhibit No. 2, will you mark on that exhibit the general location of these 1,880 acres?

Mr. Galles: I wonder if I might examine the witness first on the contract in order to determine whether this sale is admissible as a comparable sale, voir dire?

Mr. Schiltz: We will bring that out before we are through, I think. [260]

The Court: He hasn't finished qualifying him yet.

Mr. Galles: I will object to any further evidence on this transaction until it is determined that the exhibit is admissible in evidence.

The Court: I will overrule your objection. He is qualifying the witness now and the lands and proceeding to show the comparability of the land, and when he finishes and makes the offer, why then you can examine.

Mr. Galles: Perhaps I am premature, but I want to get my objection in before any values are testified to.

The Court: Make your objection as to values when the time comes.

(Testimony of Richard Allen Ray.)

Mr. Schiltz: Will you read the last question, Mr. Reporter?

(Question read back by Reporter as follows: Question, Directing your attention again to Defendants' Exhibit No. 2, will you mark on that exhibit the general location of these 1,880 acres?)

Q. Will you do that, please, Mr. Ray?

(Witness does as requested.)

Q. Just draw a rough circle generally outlining the area involved.

(Witness does as requested.)

Q. Will you write there "Kolstad to Ray"?

(Witness does as requested.) [261]

Q. Now, looking at the map, I notice you have marked an area that is roughly seven or eight miles to the east of the Kolstad land?

A. That's right.

Q. That is, the Kolstad lands involved in this case, is that right? A. Yes, that's right.

Q. Now, how are these lands located with reference to the Marias River?

A. Oh, I think they are about—the south end would be about three miles north of the Marias River.

Q. How are they located with reference to Cottonwood Creek?

A. They would be west about, well, maybe a little more than that, maybe 7 or 8 miles.

(Testimony of Richard Allen Ray.)

Q. With reference to the Great Northern Railroad, how are they located?

A. Nine miles south.

Q. Are these lands in what you would call the winter wheat belt?

A. Yes, it is getting down where you can raise winter wheat pretty consistently.

Q. Of these 1,880 acres, how many were cultivated?

A. Everything but 20 or 30 acres.

Q. Substantially all of them were cultivated?

A. Yes. [262]

Q. Were there any improvements on these lands?

A. Yes.

Q. What was the nature of the improvements?

A. Buildings, a real good set of buildings.

Q. What kind of buildings?

A. There was a house, a four or five room house; there was a Quonset hut and some granaries plus a shop and another small building, a one room bunk-house.

Q. How do the lands involved in this sale, from your knowledge, compare with the lands belonging to Clarence Kolstad and Alta Kolstad and the joint lands of Clarence and Alta?

A. It is all getting down there in the same neck of the woods. It is pretty comparable. They both raise winter wheat pretty regularly.

Q. What was the selling price for these lands, or the purchase price, in your case?

Mr. Galles: I will object as the exhibit is the best evidence.

(Testimony of Richard Allen Ray.)

The Court: The objection is sustained. There has been no foundation laid yet, either, sufficient foundation of similarity with reference to terms. I suppose they appear in the exhibit.

Mr. Schiltz: At this time we offer into evidence Defendants' Exhibit 20.

The Court: Is there objection? [263]

Mr. Galles: May I question the witness with reference to this exhibit?

The Court: Yes.

Mr. Galles: Do you and your mother own this land now, Mr. Ray? Was this contract for deed completed by delivery of the deed in escrow to you and your mother?

A. That's right, it was in escrow in the bank.

Mr. Galles: And you paid the full purchase price, that is, the terms of the contract?

A. The terms of the contract, right.

Mr. Galles: You paid the full purchase price?

A. Yes.

Mr. Galles: And then you have since sold it?

A. That's right.

Mr. Galles: And given a deed back?

A. Yes.

Mr. Galles: Wasn't there a cancellation of this contract?

A. No, we just gave the contracts back.

Mr. Galles: You just exchanged contracts, destroyed the contracts, or gave them back?

A. Yes. It was taken back out of escrow and re-

(Testimony of Richard Allen Ray.)

turned, all the papers and everything was returned back.

Mr. Galles: So that the transaction was never completed, was called off? [264]

A. No, it was completed right down to the last letter. Everything was supposed to be recorded. The only reason it wasn't recorded was just neglect. If it was recorded, it would never have been turned back.

Mr. Galles: If it were in escrow, you intended that neither party could record it?

A. It could still be recorded.

Mr. Galles: If it is in escrow? A. Sure.

Mr. Galles: When were the papers withdrawn from the escrower of the transaction?

A. Sometime in March, 1956.

Mr. Galles: March of last year?

A. That's right.

Mr. Galles: That was how many months? This is dated October 14th, so it is about five months after you entered into this contract that the papers were withdrawn from the escrow arrangement?

A. That's right.

Mr. Galles: Well, what money was transferred between Mr. Kolstad and yourself and your mother at the time these papers were withdrawn from escrow?

A. Well, the same amount of money that was paid to begin with, the down payment and half the escrow charges, some interest. [265]

Mr. Galles: What was the down payment in this?

(Testimony of Richard Allen Ray.)

A. It was 29 per cent.

Mr. Galles: That was \$68,875?

A. I guess that is what it was.

Mr. Galles: Whatever is stated in there?

A. Whatever is stated in there is what it was.

Mr. Galles: You and your mother had paid that amount? A. Yes.

Mr. Galles: And then that same amount was received back by you about five months later from Mr. Kolstad?

A. Yes, received from Mr. Kolstad.

Mr. Galles: Plus commissions?

A. Plus commissions and escrow charges and everything else.

Mr. Galles: I object to the introduction of this exhibit, your Honor, and the use of the sale as comparable in that it appears that it was not a completed transaction, the contract was not carried out.

The Court: He says it was.

Mr. Galles: That is, however, his opinion. I don't believe he is qualified. I think the facts he has testified to will show they started out on this contract and then called it off.

The Court: Develop it then more clearly.

Mr. Schiltz: I was going to suggest, your Honor, that before ruling, I would like to ask a few more questions if I [266] may.

The Court: Yes.

Q. (By Mr. Schiltz): Mr. Ray, you have testified that the transaction was completed, you signed these papers, each of you took a copy, one copy was escrowed at the bank together with a deed for the

(Testimony of Richard Allen Ray.)

land, the abstract was continued and was examined by your attorneys, you accepted the title, the abstract itself was escrowed with the bank, is that right? A. Right.

Q. You paid your money as a down payment, is that correct? A. Yes.

Q. As a part of the purchase price, did you also pay the real estate commission to Mr. Fox?

A. Yes.

Q. That had been paid? A. Yes.

Q. So, as far as you were concerned, you had bought yourself a piece of land?

A. That is correct.

Q. Then how did it come about that this contract was eventually given back to Mr. Kolstad and the papers, or the deeds and papers and so on released from escrow, how did that happen?

A. Sometime after the contract had been completed, why we heard Mr. Kolstad wasn't too happy that he had sold. We [267] didn't know——

Q. In other words, he wished he hadn't sold, is that right?

A. Yes, he thought it was a pretty good farm, and he doubted whether he had done himself too much good by selling, so we seen him sometime later and talked it over. He mentioned he would like to have it back, and nothing was done.

Q. Have you known Mr. Kolstad quite a few years, many years as——

A. Yes, many, many years.

Q. Friendly with him as a neighbor?

(Testimony of Richard Allen Ray.)

A. Yes.

Q. So what happened with regard to allowing it to be released from escrow?

A. Sometime after the first of the year, I think it was in February, we had gone down to Great Falls, and Mr. Kolstad set us up down there in Great Falls and asked if it was all right with us, he would like to have his farm back, and he would take care of all the charges and see to it that we weren't out anything if he could have it back.

Q. You and your mother agreed to let him have it back?

A. Yes.

Q. You were perfectly willing to continue with the contract?

A. Yes, it was fine.

Q. Under the terms of—in your letting him have the property [268] back and releasing the papers from escrow, were you made whole so you weren't out any money?

A. Yes.

Q. He returned your down payment?

A. That's right.

Q. He paid the escrow charges?

A. That's right.

Q. Did he pay the interest that you were entitled to as a result of having your down payment tied up during that period of time?

A. Yes, there was some interest involved.

Q. Did he also reimburse you for the real estate commission you had paid to Mr. Fox on his behalf?

A. Yes, he paid that in full.

Q. So, in effect, really you sold the property back to Mr. Kolstad, is that right?

(Testimony of Richard Allen Ray.)

A. That's right, yes.

Mr. Schiltz: We renew our offer of Defendants' Exhibit No. 20.

The Court: Let me see the document. When you say the contract was completed, you mean it was signed, is that what you mean? You didn't make all the payments that the contract required?

Mr. Schiltz: I am sorry. They didn't make all the payments. They made all the payments they should have made. [269]

The Court: He didn't make all the payments as required by the contract.

Mr. Schiltz: Let me say this: As of that date, he made all the payments under the contract.

The Court: Yes, you can't do everything at once, but the contract requires more payments, I suppose?

Mr. Schiltz: Over a period of years.

The Court: He didn't make all the money payments. The objection is sustained.

Mr. Schiltz: You are excused, Mr. Ray.

Cross-Examination

By Mr. Galles:

Q. Just a minute, I have a couple questions on the sale you made to Mr. Kamerzel. You stated there was some growing crop on that land?

A. There was some seeded crop, yes.

Q. Well, seeded. The sale was made when?

A. The first of April, the first part of April.

Q. Isn't it true the contract was dated April 14, 1955?

A. It could be.

(Testimony of Richard Allen Ray.)

Q. The middle of April? A. Yes.

Q. And that there was 320 acres of winter wheat growing at that time, or seeded? [270]

A. Yes, that's right.

Q. And there was 200 acres of summer fallow?

A. Yes.

Q. And in 1955, you had a pretty good stand of wheat about that time, didn't you?

A. That early it wouldn't show up very much. It was kind of dry that early in April. It was there, but there was nothing definite about it.

Q. Do you know what Mr. Kamerzel eventually took off that 320 acres of winter wheat that fall?

A. No, I wouldn't. I was never around there when he cut it or anything. I was busy.

Q. I see. What was the value of the granary that was on there? A. I think I stated \$2,000.

Q. Yes, I believe you did. And all but three or four acres of this was cultivated, and it was what you might call blocked out nicely, wasn't it?

A. Pretty fair.

Mr. Galles: That is all.

Mr. Schiltz: That is all.

The Court: Call the next witness. You are excused.

(Witness excused.)

Mr. Schiltz: The next witness will be a fairly long witness, your Honor. Is this a good time for a recess? [271]

The Court: Take a recess at this point? All right.

(Jury admonished.) Court will stand in recess until 11 o'clock.

M. J. HOLBROOK

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schiltz:

Q. For the record, will you state your name, please? A. My name is M. J. Holbrook.

Q. Where do you reside, Mr. Holbrook?

A. I reside on my farm outside of Portland, Oregon.

Q. What is your occupation?

A. Real estate consultant and appraiser.

Q. What is your educational background generally?

A. I graduated from the public schools in Portland, then attended St. Martin's College just outside of Olympia, Washington. I attended Stanford University, and I have taken specialized courses in my field.

Q. Give us a summary of your business activities since college?

A. I was first employed by Norris, Beggs and Base, who are one of the largest real estate firms on the Pacific Coast, having offices at that time in Seattle, Tacoma, Portland and [272] San Francisco.

Q. What year was that?

A. That was in 1936. I was then employed by the General Petroleum Corporation until 1941, at which

(Testimony of M. J. Holbrook.)

time I resigned and was employed by Commonwealth, Incorporated, which is a real estate firm somewhat larger than Norris, Beggs and Base. I was with them until 1949, excepting for war service. In 1949, I formed a partnership with Mr. Walstrom, and have been in that business since.

Q. What were your duties with Commonwealth, Incorporated?

A. Commonwealth, Incorporated, I was a salesman at the time I was first employed. I then became sales manager of the so-called business property department which handled all properties except homes and subdivisions, and I was later an officer of the corporation.

Q. Now, then, since 1949, since you have had your own business with Mr. Walstrom, what do you call the business?

A. The business has the trade style of Holbrook Walstrom, Property Counsellors.

Q. What is the nature of the work you do now?

A. It is entirely appraisal and real estate consultant work.

Q. How long have you done that sort of work?

A. Since November 1, 1949, as a partnership; since the beginning of my real estate work in 1936 in my other capacities.

Q. As I understand it, you don't do real estate brokerage [273] work now, you are in the real estate appraisal and consultant business and have been exclusively in that business since 1949, is that correct?

A. Correct.

(Testimony of M. J. Holbrook.)

Q. Do you belong to any professional organization or society? A. Yes, to a number of them.

Q. Will you give us a representative list of those?

A. I am a member of the American Institute of Real Estate Appraisers, with the designation of M.A.R. I am a senior member of the Society of Residential Appraisers with the designation of S.R.A. I am a member of the Appraisal Institute of Canada with the designation of A.A.I.C. I am a member of the Institute of Real Estate Management with the designation of C.P.M. I am a charter member of the American Society of Appraisers. I am a member of the American Institute of Real Estate Counsellors. I belong to others, but I consider these to be the more important.

Q. Are all of these organizations and societies having to do with your profession as an appraiser, is that correct? A. Yes.

Q. Is there any particular significance to your membership in these organizations so far as this case here is concerned? A. Yes, I believe there is.

Q. What is significant about it? [274]

A. Well, particularly in the instance of the American Institute of Real Estate Appraisers and the Appraisal Institute of Canada, the requirements for membership are such that they tend to establish the background of the individual and his qualifications.

Q. In other words, you don't just become a mem-

(Testimony of M. J. Holbrook.)

ber by sending in an application blank, is that correct? A. That is correct.

Q. How does one become a member of these two organizations?

A. Both of them are very similar. They require the minimum requirements for membership are one must be at least 30 years of age, have a minimum of five years' appraisal experience or allied experience, pass two written examinations, submit three appraisals which must be satisfactory to examining committees and then be approved by various local and national groups interested in the membership. The Appraisal Institute of Canada goes further to the extent that they have qualified their membership into two further brackets, one in rural appraisals, and the other in urban appraisals.

Q. Which branch do you belong to?

A. I qualify in both.

Q. How long have you been a member of the American Institute of Appraisers?

A. I believe since 1948.

Q. Have you taken part in the educational program of this [275] American Institute of Real Estate Appraisers?

A. Yes, I have been on their faculty for several years, and I have been in charge of their educational program insofar as courses offered through various colleges in the United States.

Q. Have you taught any courses in appraisal of real estate? A. Yes, I have.

Q. Where have you taught such courses?

(Testimony of M. J. Holbrook.)

A. At Northwestern, Chicago University, Southern California, Stanford University, several years at Southern Methodist, University of Washington, University of Oregon. This year I will teach at Cornell. Those are representative of some of the colleges at which I have taught.

Q. Have you had any other teaching experience?

A. Yes, I have. I have also taught for various organizations and groups, including realty boards, the Society of Residential Appraisers, the American Society of Appraisers. I have presented courses in Canada to groups such as the British Columbia Assessors.

Q. Have you held any offices in any of the professional organizations?

A. Yes, I have been a president of the local chapters of all of the organizations which I have named, with the exception of the Appraisal Institute of Canada. I have held national office in the American Institute of Real Estate [276] Appraisers as governing counsellor; I have been a national vice president of the Institute of Real Estate Management.

Q. Have you published any articles or books on the appraisal of real estate?

A. Yes, I have published several.

Q. In the years you have been in the appraisal profession, how many appraisals would you estimate you made?

A. I can more accurately answer that for the years beginning with November, 1949, to date be-

(Testimony of M. J. Holbrook.)

cause my appraisals are numbered. I have done in excess of 2,000 in that period.

Q. How do these appraisals break down as to urban and farm appraisals?

A. They are about 40 per cent urban appraisals and 60 per cent farm appraisals.

Q. From the standpoint of the diversity of appraisals you have made, give us some idea of three or four or five different types of appraisals you have made?

A. Yes. I have appraised quite a wide diversity, including volcanic, cinder and coral reefs, large ranches, office buildings, practically the whole field of appraisal that would come before an appraiser.

Q. More to the point for this case, how much wheat and grazing land have you appraised?

A. In the past year, that would be 1955, up until now, I would say about 200,000 acres. [277]

Q. Of wheat land? A. Yes.

Q. How much grazing land?

A. Approximately 100,000 acres.

Q. Where have your appraisals been made for the most part?

A. The bulk of my appraisals have been made in Oregon, Washington, Idaho, California, Oklahoma, Texas, Kansas, Hawaii, although I have made appraisals in other states.

Q. Can you give us a representative sample of clients for whom you have appraised property?

A. Yes, among my clients are the United States Government—

(Testimony of M. J. Holbrook.)

Q. For what departments of the United States Government have you appraised?

A. I have appraised for the Department of Justice, Commerce, Alien Land Custodian, War Assets, General Services Administration, and other branches within the government.

Q. Have you done any appraisals for state governments?

A. Yes, I have appraised for the States of Oregon, Washington, Idaho and California.

Q. Have any of these appraisals involved condemnation actions?

A. I would say that a large percentage of them have.

Q. And the purpose of those appraisals then has been to determine the fair market value of the property to be taken by condemnation? [278]

A. Those in condemnation have been for fair market value, yes, sir.

Q. Have you done any appraisals for corporations?

A. Yes, for a number of corporations.

Q. Give us a small sample of those?

A. Among the corporations I have appraised for have been the Great Northern Railroad, Reynolds Metals Company, Alcoa, General Motors, people of that caliber.

Q. Have you qualified as an expert appraiser in any courts or before any commissions and that sort of thing?

A. Yes, I have qualified before federal courts, state courts and federal commissions.

(Testimony of M. J. Holbrook.)

Q. Now, then, Mr. Holbrook, were you employed to make an appraisal of the lands in Liberty County belonging to Clarence Kolstad and Alta Kolstad, and of the joint lands of Clarence and Alta Kolstad?

A. Yes, I was.

Q. When were you employed?

A. In October, 1956.

Q. By whom were you employed?

A. By you on behalf of the Kolstads.

Q. And what was the purpose of your employment in this matter?

A. The purpose of my employment was to determine the market value of the separate—my original employment was to determine [279] the market value of the entire ownerships of the Kolstads, and eventually the separate ownerships as of May 24, 1955, on a fair market value both before and after the taking by the government.

Q. What is your definition of the fair market value, Mr. Holbrook?

A. Fair market value is the price in terms of money which a willing buyer will pay and a willing seller accept, both parties being fully informed as to all uses to which the property can be put, and the property exposed on the market for an ample time to make a transaction, neither acting under compulsion.

The Court: I might say fortunately his opinion of what is fair market value is also the law, so we don't have any contest.

Q. Is there a generally accepted work procedure

(Testimony of M. J. Holbrook.)

or method which appraisers use to arrive at the fair market value? A. Yes, there is.

Q. Is there a term appraisers use to describe that procedure?

A. It is known as the appraisal process.

Q. Describe to us what the appraisal process is. What does an appraiser go through when he appraises property?

A. I think quite obviously the first thing that must be done is to identify the property. By identification, you must have its legal description, you must know where it is [280] located, you must have a knowledge of the ownership within it, whether it is the full fee ownership, or whether other rights or interests are involved; you must know the date of the appraisal, and the purpose for which the appraisal is being made. Having determined those things, the next step is to make an estimate of the highest and best use of the property, which will establish your work pattern in collecting the data which will be necessary. You will then collect data which is divided into two broad categories, one being general data, all those things pertinent to the valuation which would have an effect upon the value of the property; and then specific data, which has to do with the particular property itself. Having collected all the data and information, you then process your three approaches to value known as cost or summation approach, the market data or comparative approach, and the income approach. Depending upon the quantity and quality of information which you

(Testimony of M. J. Holbrook.)

have, you will then, from the answers derived from those three approaches, arrive at your opinion of value. Upon doing that, you will complete your appraisal assignment.

Q. With reference to this particular appraisal assignment, that is, of the Clarence Kolstad lands and the Alta Kolstad lands and their joint properties, describe what you did to appraise those lands.

A. Yes. Upon accepting the assignment to appraise the [281] lands, I requested that maps, aerial photos, operating statements, legal descriptions, and any information bearing upon title be forwarded to me so that I could begin my work and formulate the work plan for collecting my information. Upon having had an opportunity to go over those factors and elements and establish my broad plan of appraisal, I then came to Great Falls, at which time I made an investigation of the availability of money, interest rates, the general tenor of farm sales within the area, and other pertinent information. I also employed at that time another appraiser to assist me in collecting the information which I required. I was there several days. From Great Falls, I went to Shelby and in Shelby, I went to the Assessor's office to secure the information which was available to me there concerning acreages, broad land classifications and tax information. I also observed their maps and such aerial photographs as they had. In addition to the Assessor, I went to the County Agent, I went to the Soil Conservation. I discussed the general as-

(Testimony of M. J. Holbrook.)

pects of agriculture in the area in which I was concerned; I discussed soil types; I secured soil maps. I also talked with the Soil Conservation man who had just completed a complete soil reconnaissance of the Chester area. I found what crop yields were; I found what their estimates of relative values of land insofar as productivity were, and secured from them a great deal of [282] reference material upon which I could check. From Shelby, I went directly to the Kolstad properties, and I went over them by automobile and walking. I might say I am a little ahead of myself. Prior to going to Shelby, I flew over the entire property in the Triangle area.

Q. What was the purpose of that?

A. There were two purposes. One of them was to determine what was within the Triangle area, its scope, its land uses and land patterns.

Q. When you say Triangle area, you mean the triangle made by a line drawn from Great Falls to Shelby to Havre and back to Great Falls?

A. That's right, yes. And specifically, I flew over the Kolstad lands so I could envision them in their entirety and make my first determinations as to a broad classification of land use, and also the position of that farm in relation to the general area in which it was lying. I spent quite some time over the property in the air. It was then following that that I went to Shelby with the background of knowing then specifically what I wanted to look for so I could relate my information to what I had seen. From Shelby, I went on to the Kolstad properties, and

(Testimony of M. J. Holbrook.)

with the background I then had of soil information and having seen the properties from the air and other data which I had, I made my first or preliminary examination. From the Kolstad [283] properties, I then went into Chester, and in Chester, I repeated the things I had done in Shelby. I went in the Assessor's office and examined the maps and records and classifications and acreage breakdowns and asked about tax matters. I also went to the County Agent and discussed with him a number of the same things I had discussed in Shelby, including the type of crops, the best farming practices, the economies in size, the grazing facilities of the community, the general conception of good agricultural practice. I then went to the Allotment Office and secured information concerning allotments and allotment practices as applied to this specific area and property. I examined the maps which they had of the detailed breakdown of the lands which was on file there. Having done these things, I came on into Havre, and in Havre, as I had in Great Falls, I consulted with various informed people such as brokers and others who had interests in lands of this kind as to their general conception and opinions. Having gotten all this information together, this data, which was still unclassified and just a mass of information, I then sat down to sift it out and to, well, take the wheat from the chaff was what it amounted to. Having boiled it down to where it could be utilized as good directive information, I correlated that with sales information which I had had prepared for me

(Testimony of M. J. Holbrook.)

by the abstract offices in both Shelby and in Chester. I had requested that [284] sales of land over a five year period within a given section be detailed for me in total as to grantor, grantee, that is, buyer and seller, the date, terms, acreages and have them located on maps for me.

Q. Now, what size was the area in which you asked for that information?

A. It comprised approximately nine townships in the immediate vicinity of the Kolstad properties, including that area.

Q. Proceed.

A. With the sales information, with the soil information, with the crop information and all the other information which I then had, I then began the process to arrive at a preliminary estimate of value to check against the information which I had found. At this time, I, also going back to the interest rates, the lending practices of the area and so forth, worked out my preliminary estimate of the income approach to value on the property, including crop yields and animal units.

Q. Now, in arriving at your opinion of value, did you take into consideration the average annual precipitation in this Chester area?

A. Yes, I made a check into that.

Q. What did you find it to be?

A. I found there was no accurate gauge for the immediate [285] Chester area. There were good records for Shelby, Dunkirk and Joplin, and there were estimates by informed people as to the Chester area,

(Testimony of M. J. Holbrook.)

which indicated between 11 and 13 inches of rainfall per year, with an average of about 11.8 inches.

Q. If you know, what is the minimum annual rainfall for economic dry land farming?

A. The absolute minimum would be eight to nine inches per year, the bulk of it falling during the crop season.

Q. I think you stated there were no precipitation records for Chester itself?

A. None for Chester itself, that is correct. It is bracketed on either side.

Q. From the investigations which you made of the soil of the Kolstad properties, what conclusions did you reach with respect to this area?

A. The soil within the Kolstad properties is known as Bainville loam, Joplin loam and Joplin fine sand loam. Those are local names of soil types. In classifying the productivity of the farm and other considerations, it would be classed as Class 3.

Q. Now, when you say Class 3, you mean by that this is third class land?

A. No, the classification is on a scale of eight, depending upon terrain, rainfall——

Q. Whose scale is this? [286]

A. This is a Department of Agriculture scale which is generally accepted as being the most accurate measurement because it takes into consideration all of the things necessary, whereas just the name, for instance, Joplin loam, doesn't indicate which condition it is in. Class 3 in the instance of this area, the Chester area, means it is the finest

(Testimony of M. J. Holbrook.)

property in the county. This is rated as a high class 3.

Q. Is there any class 2 or class 1?

A. There is not, primarily because of the rainfall, which is the greatest restrictive element.

Q. If you had more rainfall, say up to 16 or 17 inches, this might become class 2 or class 1?

A. It would become class 2 at about 16 inches.

Q. When would it become class 1?

A. At about 30 inches.

Q. What did you find concerning soil depth in this particular area?

A. From soil reconnaissances which have been made and from my own examination of the property, I found the soil ran very deep in most places. Obviously, it shallowed out on knolls, and there was a characteristic change as you came to the river breaks, but the land in wheat cultivation there, that had been plowed, had a soil depth, as far as I could determine, and also from information from the [287] soil reconnaissance, from 25 to 30 feet in depth.

Q. In your own examination, how did you determine the depth of the soil in that area, did you make a visual inspection of it?

A. For soil depth, if you don't have an auger or any other way of excavating, the best way is to look for breaks in the land or cuts or where the land breaks off to a different elevation, at which points you have a cross section of what is before you.

Q. I take it from your testimony concerning soil, so far you have been talking about the Kolstad

(Testimony of M. J. Holbrook.)

properties and the area immediately surrounding them, is that correct? A. Yes.

Q. How does the soil on these properties in that area compare with soil in the adjoining areas, the general neighborhood?

A. There is a very decided change to the south and to the east and to the west and to the north. This is relatively a restricted area insofar as the best soil groups are concerned.

Q. Have you been able to define the limits of this soil classification you made here?

A. Yes, in my opinion, I have boundaries for the soil classifications.

Q. How do you bound that area? [288]

A. It is bounded on the north generally by the Great Northern Railway; it is bounded on the east by Cottonwood Creek; it is bounded on the south by the Marias River, and it is bounded on the west by a point approximately half way between Chester and Shelby.

Q. Do these differences in the soil between the area you just outlined and the adjoining areas have any effect on your opinion of the relative or comparative value of the Kolstad lands?

A. Oh, yes, very definitely.

Q. In your determination of the fair market value of the Kolstad lands, did you consider the yields in the area? A. Yes, I did.

Q. And what did you find that to be?

A. I beg your pardon?

Q. What did you find the average yield in the area to be? A. In the area?

(Testimony of M. J. Holbrook.)

Q. What we might refer to as the Chester area?

A. The average yield of the area is approximately 19 bushels, the average yield of the county is 17.4 bushels; in the immediate vicinity of the Kolstad properties, it is approximately 21 bushels.

Q. Where did you get this information?

A. I secured that in part from Bozeman, in part from Department of Agriculture pamphlets, and in part from [289] examination of Mr. Kolstad's records, and from discussing the matter with qualified and informed people in the area.

Q. In your determination of fair market value of these Kolstad properties, did you consider the price of wheat?

A. Yes, I did.

Q. And what did you find that to be?

A. The price of wheat, of course, varies from year to year, and it varies within the months of each year, and varies also in accordance with protein content. I arrived at what I considered to be an average price that would apply to the Kolstad properties.

Q. What is that price?

A. Two and a quarter a bushel.

Q. That includes the protein premium over and above the price?

A. I utilized \$2.25 per bushel as being the average annual expectancy of wheat price from that particular property.

Q. Does that price consider Chester will be the shipping point?

(Testimony of M. J. Holbrook.)

A. Chester or Galata or one of the towns in the immediate proximity.

Q. That is the price at the shipping point?

A. In my consideration, that would be the average of the price, yes. [290]

Q. Now, then, this area you have outlined for us as having superior soil, does that also, from your determinations, control the market area to some extent?

A. Yes, very definitely.

Q. And what is the nature of that market area?

A. You mean as to the particular one which I have bounded?

Q. Are prices generally higher within that area than outside of that area?

A. Yes, they are higher, and they are higher for the very reasons by which the area is bounded. As you go outside these general boundaries which I have described, you are going from winter wheat to spring wheat; you will have a tendency to change in protein content, and you will have a very marked tendency to change in yields per acre, so all of those are elements which go to create value in wheat land.

Q. In considering sales, would it be your opinion that any sales outside of this area that you may have considered in your determination of fair market value would require some adjustment to compare them with the properties inside of that area?

A. Yes, they would require very major adjustments, because when you compare land, as an example, which is yielding 21 or 22 bushels against land yielding 10 or 12 bushels, you have very large

(Testimony of M. J. Holbrook.)

adjustments to make. When comparing winter wheat as against spring wheat, you have another adjustment [291] to make; when you have problems with rock and gravel and sand and other elements in soil, again you have to make an adjustment, so by the time you begin to make all of these arbitrary adjustments, you have a chance to make a very large error in your considerations.

Q. What is your definition of a comparable sale?

A. Well, a comparable sale—let me first state it this way: There are no two pieces of land in the world which are exactly alike, so a comparable sale is a sale which has been made under the definition of market value——

The Court: Just a minute. You are asking the witness to define the law, and I don't think that is proper.

Mr. Schiltz: I will withdraw the question.

The Court: It is a matter of you presenting evidence of a comparable sale and the Court deciding whether or not it is admissible for the jury to determine its comparability under the instructions of the court.

Mr. Schiltz: Withdraw the question.

Q. Did you find from your investigations any trend in Montana and in this area as to the size of dry land farms?

A. Yes, a very marked trend. Since 1920 the number of dry land farms has been decreased, and the acreage per farm has been increased very ma-

(Testimony of M. J. Holbrook.)

terially. Both Liberty and Toole Counties have very high acreage farms.

Q. Have you any idea of the average size of farms in these [292] counties?

A. Yes, they would approximate a minimum of 1800 to 2000 acres per unit.

Q. Did you take into account, then, the size of the individual Kolstad properties in your determination?

A. Yes, that is a very definite part of my considerations.

Q. Now, then, you testified that you had the abstracter make a rundown for you of all sales in the area and that you gave consideration to these sales. What did you find from that information, what did you conclude?

A. Well, first, I had something over 100 sales to look at, which, having established certain comparable items in relation to soil, location to market, and other factors, I was able to eliminate a great number of them, and then coming down within the area of the Kolstad lands where you have the best areas of comparability, I found only three sales. There are other sales which are on the perimeters of this area which I have bounded, but the adjustments necessary are so great, it would lead, in my opinion, to a high degree of error, so from that, I found that the sales tended to establish a floor, or the base from which the unit value of land could be established.

Q. After you had secured all the data having any bearing on the fair market value of the lands

(Testimony of M. J. Holbrook.)

generally in the Chester area and the Kolstad properties, did you proceed to [293] appraise the lands belonging to Clarence Kolstad?

A. No, prior to doing that, I then went back and made a more rigid classification as to highest and best use of the lands.

Q. What did you classify the Clarence Kolstad lands as, as to the highest and best use?

A. Its highest and best use is for dry land farming, currently for raising wheat and secondary grains such as barley. Probably there is a portion of the area that would best be adaptable and suitable for grazing.

Q. How many acres did you determine Clarence Kolstad had in his tract of land before taking?

A. Mr. Kolstad had in rounded acres, approximately 5179 acres.

Q. And how did you classify this land as to use?

A. I broke them into three broad classifications, as plowed, tillable—that land which could be plowed and put into crop, but had not been broken—and grazing.

Q. How many acres of plowed land did he have?

A. In rounded acres, approximately 2550.

Q. How many acres of tillable land?

A. Approximately 834.

Q. How many acres of grazing land?

A. Approximately 1795.

Q. Are you familiar with the maps we have been using [294] throughout the evidence in this case?

A. Yes, I assisted in the preparation of them.

(Testimony of M. J. Holbrook.)

Q. Now, do the figures which you have just given compare substantially with the outlines on the maps?

A. Yes, they are correlated very closely.

Q. Now, then, I notice you said you classified 1795 acres of grazing land? A. Yes.

Q. Does that include bottom and alfalfa as well as upland grazing?

A. Yes, I have classed all of the types of land on which cattle would run as being grazing rather than breaking them into separate component parts.

Q. Anything not plowed or tillable, you have classed as having a highest and best use as grazing land? A. Yes, that is correct.

Q. Now, after the taking of the lands on May 24, 1955, how many acres did Clarence Kolstad have left, according to your classification?

A. After the taking in total?

Q. Yes.

A. He had approximately 1400 acres remaining.

Q. How did that classify?

A. That broke into the same three classifications as I utilized before, but into two units, one unit being south of [295] the Marias River, and the other north of the Marias River. In that area south of the river, there were 70 acres of tillable land, and approximately 10 acres of grazing land. To the north of the Marias River in the plowed land there is approximately 807 acres, in tillable land, approximately 309 acres, and in grazing land, approximately 202 acres.

(Testimony of M. J. Holbrook.)

Q. Now, I direct your attention, Mr. Holbrook, to what has been marked as Defendants' Exhibit 5, and ask you if you recognize this map as depicting the Clarence A. Kolstad properties?

A. Yes, I do.

Q. Now, then, these are the lands (indicating) you are talking about now, the lands after the taking, is that correct?

A. Yes, that is correct.

Q. Now, then, Mr. Holbrook based upon the matters and facts to which you have testified, including your descriptions of the lands you classified, of their highest and best use, their productivity, and sales, do you have an opinion of the fair market value of the Clarence A. Kolstad lands before the taking on May 24, 1955?

A. Yes.

Q. What is that opinion?

Mr. Galles: Just a minute, please, I object to the question as no proper foundation has been laid in that I don't [296] believe it was shown when he visited the lands and the condition of the lands when he visited them.

The Court: With reference to what?

Mr. Galles: Well, your Honor, yesterday, I think the witness Clarence Kolstad said that the land was flooded or partly flooded, and I would like—I think it goes to the admissibility of this evidence as to whether or not—

The Court: Examine him a little further with reference to when he examined the lands.

Q. When did you go upon these lands?

(Testimony of M. J. Holbrook.)

A. I was first on the Kolstad properties in November of last year. I was again on them in December of last year, and I have been on them within the past several days.

Q. At the time that you went on the lands, Tiber Dam was filling up, is that correct?

A. Yes, that's right.

Q. Were you able to secure information concerning the lands that were covered by the Tiber Dam Lake?

A. Yes, I secured a great deal of information concerning them, also pictures, and I had other matters of record before me which assisted me in looking at the area as to the relationship of that area flooded to the whole.

Q. Did you examine aerial photographs concerning the properties that were covered?

A. Yes, I did. [297]

Q. Did you compare the bottom lands covered by the Tiber Dam Lake with similar lands, bottom lands below the dam?

A. Yes, I did.

Q. In your opinion, were you able to secure sufficient information in order to form an opinion as to the value of those lands?

A. Yes, with no difficulty.

Mr. Schiltz: We renew our question.

Mr. Galles: Your Honor, I will continue to object. This witness may be able to testify as to the value of the remaining lands which he had available to him for examination, but I will object to the

(Testimony of M. J. Holbrook.)

testimony of his opinion of value of the entire ownership.

The Court: I think we had better have a discussion because this is important to you. (Jury admonished.) Court will stand in recess for five minutes.

(Five-minute recess.)

(The following proceedings were had in the absence of the jury:)

The Court: What is your position?

Mr. Galles: Your Honor, according to the information I have received as to the level of the water on November 20, 1956, according to the official records, which we can establish by proper evidence, of course, was that elevation 2972.76 was reached. I believe the crosshatching on the map [298] was testified to as being 2980, which is just eight feet higher. It might cover quite a little area horizontally in some cases, still not so much in others, depending on the incline. By further rough calculations by somebody qualified to testify to the number of acres under water at the time this witness examined the lands, we have in the Clarence Kolstad land 1728 acres that were under water, and, of course, that is the parcel he is about to testify to, and that is out of the 5180 acres of the total parcel.

Mr. Schiltz: Your Honor, we don't contend the land wasn't covered. As a matter of fact, more land was covered than Mr. Galles stated.

(Testimony of M. J. Holbrook.)

The Court: Yes.

Mr. Schiltz: But he has testified he examined aerial photographs and actual photographs of the property, made investigations from talking to people and finding out what the land looked like compared with other lands, and he found out they were similar to the ones below the dam, he has a reasonably good record of how many acres were cultivated. I plainly and frankly admit it isn't so much whether he has seen the land or not, he has got data from which he can form an opinion. The weight which can be given to the opinion by reason of his not having seen the land is a question to be submitted to the jury under proper instructions, or Mr. Galles can argue to the jury that he has considered wheat [299] production off of wheat lands that were submerged, he has considered animal units, he has testified to grazing lands under water. That can be argued to the jury, but he has production data and other data on which he can form an opinion.

The Court: Isn't it quite obvious he doesn't have production data from acres under water?

Mr. Schiltz: He has testified he made an investigation as to production from the various parcels of land.

The Court: Including what was under water, but how do you attribute anything to what was under water, when he never saw it, from records. Does what the records show all come from what was under water, or does half, or does none of it?

Mr. Schiltz: He knows from Soil Conservation

(Testimony of M. J. Holbrook.)

records what acres were plowed and tillable and the soil conditions. I submit it is a jury question of the weight to be given to his opinion by the jury.

The Court: When you are faced with a question like this—aren't you faced with the necessity of submitting to the witness a hypothetical question when the witness hasn't seen it. When an expert hasn't seen the fact, don't you have to submit to him the fact or facts, then, in order for him to express an opinion about them? Don't you have to submit a hypothetical question based on the facts in evidence, not on something we don't know about? [300]

Mr. Schiltz: Aside from having seen the land, he knows as much as there possibly can be known about that land.

The Court: If he can testify, of course, that from what he saw, he can tell——

Mr. Schiltz: Not only what he saw of the land itself, but from investigations he made about the land.

The Court: From what he saw and from his investigation, if he can testify that he knows what the land and under water was.

Mr. Schiltz: He has so testified.

The Court: Has he said that?

Mr. Schiltz: Yes, he testified that his classification of this land is in substantial agreement with the classifications as shown upon this map.

The Court: Well, yes, he has said that, but doesn't he—wouldn't he be required, if it is admissible at all, wouldn't he be required to say, "While

(Testimony of M. J. Holbrook.)

the land is under water and I never saw the land, from the information I have detailed to you, I can tell you what kind of land that is." Wouldn't he have to be able to say that?

Mr. Schiltz: I think he has said that.

The Court: I don't understand he has. It may be from what he has said you could draw that inference.

Mr. Schiltz: He has testified from soil maps he knows where the land breaks, where the difference in soil comes in, soil types; he has said that south of the river the land is [301] and the soil is a little lighter and a little shallower, not quite as good. He has testified as to everything you could possibly find out about the land, I submit, whether he saw it or not.

The Court: Doesn't he have to say, to take it one step further and say, "From all of that I can tell you what the land is underneath the water." He has to take one step further, just that plainly, just that simply.

Mr. Schiltz: I think he has done that when he stated the classification of the lands——

The Court: If that is what his opinion is, and if he is qualified to say that, all he has to do is say it, we don't have to take it upon any inference.

Mr. Schiltz: He can say it again, then.

Mr. Galles: I understand him to say he could tell what the lands under water were like by making comparisons with other lands along the Marias River, comparing those lands not flooded, which apparently

(Testimony of M. J. Holbrook.)

he looked at, although he didn't say so, with aerial photographs of the subject property.

The Court: Of course, if a man says he can do that, I suppose he is entitled to his opinion, and then it would be a question for the jury to determine whether or not to give any weight to it.

Mr. Schiltz: If I may make one further suggestion, your Honor, it has a bearing on this situation. I have tried cases [302] before the Indian Claims Commission under the same rules as prevail in Federal Courts. It is customary in these unique cases for appraisers to evaluate lands, some the government uses, and some we use, to evaluate lands as to how they looked and how they were in 1868. They can't have seen the lands as they were then, but they get all the information they can get. If that information is weak, the case is weak. I submit that is the case here. He has made every investigation he can make. In his opinion, he thinks he knows what the lands looked like, how they were used, and what they would produce.

The Court: An expert can tell you the geological formation of 15,000 years ago, and he can tell you what it looked like, I suppose.

Mr. Schiltz: We have here the added advantage, and he so testified, of a witness who has made inquiries of contemporaries. This is only a year ago, six months ago. He made inquiries of people who knew the land and found out all about the land. I submit he knows as much about the land as anybody before it was flooded short of the landowner himself.

(Testimony of M. J. Holbrook.)

The Court: That is all true. If he can testify that he knows what the land looked like and its characteristics as a result of the information that he has detailed to us on the stand, why then, I suppose he is qualified to express that opinion. If he says that, he can tell us. [303]

Mr. Schiltz: It is simple enough.

The Court: But we can't assume—in other words, I don't think he can go upon the stand and testify as to hearsay just because he claims to be an expert on market value.

Mr. Schiltz: Well, I think nine-tenths of what an expert testifies on is hearsay, as a matter of fact.

The Court: It may be, but he can't testify as to what this land is, the land that is under water, he can't testify as to what it is on the basis of what somebody else told him unless it is presented to him in the form of a hypothetical question, unless it is evidence in on the record. In other words, isn't it true that you could bring a witness in that has never see the land, and he would say, "Yes, I have an opinion of the value of the land under water there"——

Mr. Schiltz: That can be done.

The Court: "It is one million dollars," but what is it based on.

Mr. Schiltz: I think that is possible.

The Court: But you have to present the facts first, and you have to present to the Court the fact of expertness. This man has to be able to tell the Court and jury he can tell you what kind of

(Testimony of M. J. Holbrook.)

land this is under water although he has never seen it. Now, if he can, and I suppose he can——

Mr. Schiltz: Let me put it another way: A doctor can testify in a personal injury case that this leg is broken. [304] He has an X-ray to see it. He has never seen the leg, he has never seen the man.

The Court: That's right.

Mr. Schiltz: This man has not only an X-ray, he has aerial photographs, all the information——

The Court: That is all he has to tell us then is that from aerial photographs—if all the information he bases his opinion on comes from aerial photographs—all he has to do is say, "Yes, I saw the aerial photographs of this land, and I can read those photographs and tell you it is the same kind of land I saw below the dam."

Mr. Schiltz: I think he has done that. Then from that point on, it is just a question of the weight.

The Court: Isn't that so, counsel, do you take any other position?

Mr. Galles: No, I believe it is probably right, although I would like to be able to look at a book or two right now and see if I can find anything.

The Court: I agree with you, counsel, he doesn't have to have seen the land, but if from any other information he has given to us here, he can express an opinion, then all we have to do is have him express that opinion. I didn't believe it was clear. I don't think it was clear, although it may

(Testimony of M. J. Holbrook.)

be taken as an inference from all he has said. I don't believe he has specifically said, "From the information I have had, [305] I can tell you what kind of land this was under water."

Mr. Schiltz: I will see to it that he says that.

Mr. Galles: Maybe this comes under the special qualifications of evaluating coral reefs.

Mr. Schiltz: So I understand, I don't propose to put a hypothetical question——

The Court: No, no, you don't have to if from the information he has given us already he says he knows.

Mr. Schiltz: I understand.

The Court: Court will stand in recess until two o'clock.

(Noon recess.)

(The jury returned to the Courtroom, and the following proceedings were had in the presence of the jury:)

Mr. Schiltz: Your Honor, we have no further questions of the witness regarding his qualifications, and we renew our last question as to what his opinion of the value is.

The Court: I have had the reporter read the record to me during the recess, and I will overrule the objection of the government.

Mr. Schiltz: We will go ahead and ask for his opinion?

The Court: Yes.

Q. (By Mr. Schiltz): Just so that we get ori-

(Testimony of M. J. Holbrook.)

ented here a little bit, Mr. Holbrook, just before the objection was made, you were asked if you had an opinion as to the fair market value of the Clarence A. Kolstad lands before the taking, [306] and I asked whether that opinion was based upon all the matters and things and investigations you had made and learned and so on in your investigations of that area? A. Yes.

Q. Do you have such an opinion? .

A. Yes, I do.

Q. What is that opinion?

A. In my opinion, the Clarence Kolstad farm prior to the taking as of May 24, 1955, is \$424,500.

Mr. Wiggenhorn: Give me that figure again.

A. \$424,500.

Q. How does that figure across the board?

A. Approximately \$82 an acre across the board, slightly less than that amount.

Q. Now, then, do you have an opinion, similarly based upon all the investigations you made, do you have an opinion of the fair market value of Clarence Kolstad's remaining lands after the taking, after May 24, 1955? A. Yes, I do.

Q. What is that opinion?

A. The value after the taking is \$119,300.

Q. And what is the difference between those two figures? A. \$305,200.

Q. Now, then, included in this figure, do you have any improvements? Are any improvements included in your estimate, [307] in your opinion of before and after value?

(Testimony of M. J. Holbrook.)

A. The improvements included are only those which I saw, which were fencing.

Q. Have you heard Clarence Kolstad testify here in Court yesterday and today? A. Yes.

Q. Have you heard his testimony with regard to fences and sheep sheds and so on?

A. Yes, I have.

Q. As a result of hearing that testimony, are you able to add any further value for the improvements?

A. Not within the Clarence Kolstad property, no, sir.

Q. Now, then, did you classify the Alta Kolstad land for its highest and best use in this area?

A. Yes, I did.

Q. And how many acres did you find Alta Kolstad had before the taking by the United States?

A. In rounded acres, 4699.

Q. And how did these 4699 acres break down according to their use?

A. I have broken them down in rounded acres to 1666 acres of plowed land, 1134 acres of tillable land, and 1898 acres of grazing land.

Q. I recall that Mr. Kolstad testified that he had some alfalfa land and some land that he characterized as bottom [308] land included in this. Do you have any such breakdown?

A. Yes, I do. However, I have taken the bottom alfalfa and upland grazing and combined them all as grazing land because that should be the highest and best use, utilized that way, in my opinion.

(Testimony of M. J. Holbrook.)

Q. Now, then, after the taking by the government, how many acres did Alta Kolstad have left?

A. The acres remaining in rounded acres is 2868 acres.

Q. How does that break down according to its use?

A. That breaks down into 1035 acres of plowed land, 975 acres of tillable land, and 857 acres of grazing land. All of those are rounded acres.

Q. Now, then, based upon the matters and facts to which you have testified, including your description of these lands, your classification of their highest and best use and productivity, the size of the unit, do you have an opinion of the fair market value of the Alta Kolstad land before the taking by the United States on May 24, 1955?

A. Yes, I do.

Q. What is that opinion?

Mr. Galles: To which the government objects on the same grounds as previously.

The Court: Overruled.

A. \$341,350.

Q. How does that come out as an across the board value? [309]

A. It is approximately \$72.50 an acre across the board.

Q. Similarly, do you have an opinion of the value of the Alta Kolstad lands after the taking by the United States on May 24, 1955?

A. Yes, I do.

Q. What is that opinion?

A. \$215,500.

(Testimony of M. J. Holbrook.)

Q. And I take it that \$125,850 is the difference and the damage in the taking, is that correct?

A. Yes.

Q. Now, then, are there any improvements involved in this figure of yours?

A. There are no improvements in my figure, no, sir.

Q. Did you hear Mr. Clarence Kolstad testify that on this land was considerable fencing, a five room house, barn, work shop, bunkhouse, a small garage, all of the approximate value of \$7,000, did you hear that testimony? A. Yes, I did.

Q. Assuming that testimony to be correct, then your opinion would be \$132,850 for the damage in the taking?

A. That would be correct, yes, sir.

Q. This property was all gone before you ever got on the property, and these houses, barns and improvements and so on, you never saw them?

A. No, I did not see them. [310]

Q. The only way you can evaluate them is by adopting Mr. Kolstad's testimony as to their value?

A. I haven't evaluated them; I am accepting his figures.

Q. Now, then, directing your attention to the joint land—let me ask you this: Does your breakdown by use classifications agree substantially with the map that we have shown here as Defendants' Exhibit No. 5, which involves Clarence Kolstad's lands?

A. Yes, as I have stated before, I assisted in the preparation of that map, so I concur.

(Testimony of M. J. Holbrook.)

Q. Do your figures likewise agree generally with the map which is shown as Defendants' Exhibit 7?

A. Yes.

Q. Now, then, Mr. Holbrook, directing your attention to the joint lands, lands jointly owned by Clarence Kolstad and Alta Kolstad, his wife, did you likewise classify those lands for their highest and best use? A. Yes.

Q. How many acres were involved in those lands prior to the taking by the United States on May 24, 1955?

A. In my opinion, there is 7423 acres rounded.

Q. How many acres of plowed land do you have?

A. I have 1560.

Q. This is all before the taking?

A. Yes, sir. [311]

Q. How many acres of tillable land?

A. 1754.

Q. And how many acres of grazing land?

A. 4108.

Q. That totals 7423 acres?

A. That will not total that amount because there are fractional portions which would have to be left together to get it to 7423. I have rounded to the fullest acre.

Q. How many acres of plowed land do you show? A. 1560.48, actually.

Q. All right, now, then, just as before, did you break down the grazing land into bottom, alfalfa and grazing, or did you include it all in one category?

(Testimony of M. J. Holbrook.)

A. I included it all in one category, considering there was bottom and alfalfa land and grazing land, yes, sir.

Q. Do your classifications agree with the classifications shown here on this map, substantially?

A. Yes, they do.

Q. Now, then, have you computed the number of acres in the joint lands of Clarence and Alta Kolstad remaining to them after the taking by the United States on May 24, 1955?

A. Yes, sir.

Q. And how many acres do they total?

A. 3519.

Q. How many acres of plowed land did they have left? [312]

A. I have broken the remainder into two parcels, that which lies to the north of the river and that which lies to the south of the river, or the reservoir which is formed.

Q. As shown on this map now, Defendant's Exhibit 10? A. Yes.

Q. All right, how many acres of plowed land did they have in the north unit?

A. In the north unit, 186.

Q. How many acres of tillable land in the north unit? A. 1256.

Q. How many acres of grazing? A. 1030.

Q. Now, then, in the south unit, how many acres of plowed land? A. 1005.

Q. How many acres of tillable land?

A. 188.

Q. How many acres of grazing? A. 235.

(Testimony of M. J. Holbrook.)

Q. Again, the grazing is just as it was before, you didn't evaluate it or figure it out anyway but grazing, you didn't break it down further than grazing land?

A. In this instance that wouldn't be correct. All that remains is upland grazing. The bottoms and alfalfa have been completely taken. [313]

Q. Based upon the matters and facts to which you have testified, including your description of the lands, your classification of their highest and best use and their productivity and size, do you have an opinion of the fair market value of the joint lands of Clarence and Alta Kolstad before the taking on May 24, 1955?

A. Yes, I do.

Q. What is that opinion?

Mr. Galles: To which the government objects for the same reasons and on the same grounds as previously stated.

The Court: With reference to some of the land having been under water?

Mr. Galles: Yes.

The Court: Overruled.

Q. What is that opinion? A. \$416,000.

Q. And how does that figure as an across the board value?

A. Approximately \$56 an acre.

Q. Now, then, do you have an opinion of the fair market value of the joint lands of Clarence and Alta Kolstad after the taking on May 24, 1955?

A. Yes, I do.

Q. What is that opinion? A. \$232,200.

(Testimony of M. J. Holbrook.)

Q. And then the difference, being \$183,800 as the damage in [314] taking?

A. Yes, that is correct.

Q. How does that after value figure out as an across the board value?

A. \$59.50, approximately.

Q. Now, then, were you in court when Clarence Kolstad testified in the way of improvements that there was a large lean-to, a large hog house, a large chicken house, and about 12 miles of fence on this property before the taking?

A. Yes, I was.

Q. Did you hear his testimony that the value of those improvements was about \$8,000?

A. That is correct.

Q. Did you have any improvements figured in your opinions of the values before and after?

A. None other than fencing.

Q. Assuming Mr. Kolstad's figure of \$8,000 to be accurate, then your opinion of the damage in taking would be \$191,800?

A. That is correct.

Mr. Galles: To which we object as not proper. That is a hypothetical question for which sufficient facts have not been laid.

The Court: What facts?

Mr. Galles: Well, Mr. Kolstad just testified generally, and I don't think he gave any specific information sufficient [315] upon which to base a hypothetical question.

The Court: Well, he testified as to the value.

Mr. Galles: Yes.

(Testimony of M. J. Holbrook.)

The Court: And counsel has just said that assuming that that is the value of it, will that change your valuation now that you have given. Objection is overruled.

Q. Now, then, once more——

The Court: Counsel, the witness is not saying that is the value, he just assumes it is.

Q. Once more directing your attention to the Clarence Kolstad lands, did you arrive, or did you determine what the fair market value for the various categories of this land was? In other words, do you have an opinion as to what wheat land per acre is worth in this area, speaking now of the Clarence Kolstad land?

A. I have arrived at an opinion of what the various categories that I have outlined as plowed, tillable and grazing are as related to the total value, yes.

Q. What is that opinion?

A. In my opinion, the plowed land on the Clarence Kolstad place has a value of \$125 per acre, as it relates to this particular unit.

Q. What is your opinion as to tillable land?

A. Tillable land would be——

Q. Referring still to Clarence Kolstad. [316]

A. Yes. It would be approximately \$84 per acre.

Q. What is your opinion on grazing land, bearing in mind that you have included, if there is any in this tract—was there any alfalfa or bottom land in this tract?

A. No—there was bottom land, but no alfalfa.

(Testimony of M. J. Holbrook.)

Q. What is your opinion of the value of grazing land? A. \$20 per acre.

Q. Directing your attention to the Alta Kolstad land again, do you have an opinion as to the value, the unit value of wheat lands in that area?

A. Yes, the unit value, as it applies to that particular property is again the same as the Clarence Kolstad property, \$125 per acre for plowed, approximately \$84 for tillable, and \$20 for grazing.

Q. Directing your attention now to the joint lands of Clarence and Alta Kolstad, do you have an opinion as to the unit value of the various categories in that tract? A. Yes, I do.

Q. What is that?

A. For the plowed land it would be \$115; for the tillable, approximately \$76, and for the grazing \$25.

Q. Now, then, I notice that your opinion is that the values were about \$10 lower on plowed and tillable land for these joint lands, can you give an explanation for that? A. Yes, I can. [317]

A. The joint ownership, insofar as the plowed and tillable land is concerned, the greatest part of that which was under cultivation lies to the south of the Marias River. The Marias River is the breaking point in soil quality. On the south side of the river where this particular property lies, the soil is sandier, it is lighter and shallower, it doesn't have as good a crop history, nor is it as productive land. Therefore, it has lesser value than those deeper loams which are better situated as far

(Testimony of M. J. Holbrook.)

as soil characteristics are concerned on the north side. Insofar as grazing land is concerned, the reason for the increase there is because this land had a large unit which was economic as a cattle unit because of the tendency toward more balance in bottom, alfalfa and grazing land, and it would support more animal units, so that would give us the increased value there. To put it in plain words, this land was more productive for grazing than either of the other two by far.

Mr. Wiggernhorn: Can we have just a minute, your Honor?

The Court: Yes.

Q. Now, then, directing your attention again to the Clarence Kolstad land, did you assign, or is it your opinion that the unit value of these various lands is the same after the taking as it was before the taking? A. No, it is not.

Q. And how much is the unit value of the lands after the [318] taking?

A. After taking it is \$85 per acre, where previously it is \$82 per acre.

Q. What is the reason for that?

A. The principal reason being that the bulk of the low price land has been taken in condemnation. Therefore, the remaining land has a higher value in ratio.

Q. Now, directing your attention again to the Alta Kolstad lands, I recall you testified you broke the land remaining into two units?

(Testimony of M. J. Holbrook.)

A. In the Alta Kolstad, no, I retained that in one unit.

Q. I am sorry, in the joint land.

A. In the joint land I did.

Q. Did you assign any difference in value because the land was broken into those two units?

A. Yes, I did.

Q. What was the difference?

A. On that area south of the river, the plowed land prior to the taking when it was a totally contained unit, it was my opinion that the value was approximately \$115 an acre, while after the taking, because of the separation and all of the soil being in a lighter and sandier area, it was worth only \$100 per acre. The tillable land, as an entire unit, I estimated its value to be approximately \$76 per acre before the taking and \$65 after the [319] taking.

Q. For the same reasons?

A. For the same reasons, yes.

Q. What about the grazing land?

A. I estimated the value of the grazing land before the taking at \$25 per acre, and after at \$5 per acre. That, however, is for a different reason.

Q. What is that reason?

A. The remaining amount of grazing land is insufficient to be an economic unit, and also the land is now held from water, so there is no water for the cattle.

Q. And so far as the grazing land is concerned,

(Testimony of M. J. Holbrook.)

did you apply that same reasoning to the other two units, the Alta Kolstad and Clarence Kolstad lands?

A. Yes, I did.

Q. Your after value is reduced to \$5 per acre in each case?

A. In each of the three units, I have reduced it to \$5.00, not because it has a use for grazing, but because it has a value for holding the entire property together.

Q. It no longer has value for grazing?

A. In my opinion, no.

Q. Why has it no use for grazing?

A. Basically because of lack of water, and secondly because of lack of size.

Mr. Schiltz: You may cross-examine. [320]

Cross-Examination

By Mr. Galles:

Q. Mr. Holbrook, you said that you looked at aerial photographs in assisting you in arriving at your conclusion, is that right? A. Yes.

Q. What was the date on the aerial photograph which you looked at?

A. I looked at several sets of aerial photographs, including those which had been entered as exhibits in the prior trial at Glasgow, those in the Soil Conservation office, and some of those in the Assessor's Office. I can't tell you what the exact dates were, I don't know.

Q. Did you assist in the preparation of Exhibits 7 and 5, and I believe 10?

(Testimony of M. J. Holbrook.)

A. Yes, I have so testified.

Q. And were they prepared on the same scale as the aerial photographs, is that the reason they happen to be four inches to the mile?

A. I believe the aerial photographs were 1 to 200,000. There is a variability on those. These maps were made finally from a much smaller scale map and in turn blown up.

The Court: I take it, Mr. Holbrook, that from an examination of those photographs, you could tell what kind of land was involved in the pictures, is that so? [321]

A. It would be indicative of the type of land, it would not be conclusive necessarily. It would take more evidence than that before you could tell exactly. I examined, among other things, soil maps, topographical maps, actual photographs of the property, production and crop records. I consider things of that nature. Having considered all those, I could arrive at a conclusion of what the lands were like.

Q. (By Mr. Galles): Your conclusion was the lands were of the type and character pictured on Exhibits 5, 7 and 10, is that right?

A. That's right.

Q. I don't know exactly what aerial photographs you were referring to as introduced in the case in Glasgow.

A. They were United States Department of Agriculture pictures.

(Testimony of M. J. Holbrook.)

Q. That wasn't of this particular land, though, was it?

A. It was of this entire area, and also some areas bordering. Obviously, when you take an aerial photograph, you are not going to be able to focus on just the boundaries of one property. It included particularly the Kolstad properties, but in addition those which bordered.

Q. Now, I have before me an aerial photograph, and you stated you flew over this area last what, last fall?

A. Yes, that is correct.

Q. Just a month ago? [322]

I wonder if by looking at this prospective exhibit, I will say, you could say if this accurately portrays the land that you flew over except that portion that was covered by water? I will give you the opportunity to look if you think you can.

Mr. Wiggenhorn: Just a minute. The thing you have referred to as an aerial photograph here is in no manner identified here.

The Court: It should be marked before questioning the witness.

Mr. Galles: I thought if he said he couldn't, I wouldn't have it marked. I thought if he said, "No," I would put it aside.

Q. The aerial photograph has been marked Plaintiff's Exhibit 21, and I will try and hold it so that you may——

A. Now, what was your question?

Q. If the lands depicted in this exhibit appear the same, or represent what it purports to rep-

(Testimony of M. J. Holbrook.)

resent, that is, the tract of Clarence Kolstad, as you checked it when you flew over it as you have testified?

A. May I ask some questions to assist me in arriving at that answer? I would like to know at what altitude these were taken; I would like to know at what scale it is; I would like to know at what time it was taken, because it makes some difference to me, and further, I would like to [323] compare it against the map which I assisted in preparing. Then, I could answer you.

Q. I don't know myself. I have a witness here who does know that, but can you answer my question and state whether or not this appears to be the same as when you flew over it? If you flew at a different altitude, I would assume your answer would be no.

A. Your assumption is incorrect. It appears to be similar. Whether it is the same or not, I couldn't tell without the identification.

Q. You haven't seen this aerial or the aerials produced from the same negatives in working on your appraisal?

A. I may have, I don't know. I have no way of identifying this because it carries no legend, no scale, no time or nothing. I may or may not. It is just a picture as it stands. I can't tell whether I have ever seen it before.

Q. If I were able to give you the data on it—well, in fact, I will, and you can perhaps tell whether this is one you used.

(Testimony of M. J. Holbrook.)

A. It would be better if I compared the two, then I could give you an exact answer.

Q. First of all, I will say this is an official Bureau of Reclamation photograph. Have you seen any of those?

A. No, I have relied upon the United States Department of Agriculture. [324]

Q. That is all right; I think that answers it. You may not have seen this one.

A. I still may have seen it because I have seen a number of them, but the greatest number I have seen were from the Department of Agriculture.

Q. Mr. Holbrook, I want you to look at this aerial while I tell you some of the details of it, as we are prepared to have shown. I have said this is an official Bureau of Reclamation Aerial Photograph, or a series of them put together to form what you might call a mosaic, and it was taken on November 4, 1953, between the hours of 10:30 a.m. and 1:44 p.m., at 8100 feet above sea level, or about 5,000 feet above the ground; that it was taken from a Fairchild Cartographic Air Camera, contact prints—these are contact prints of the original negative on aerialgraphic Kodak film—

Mr. Wiggenhorn: I dislike to interrupt counsel, but may I suggest this is a statement of facts here by counsel which he might assume probably in the nature of his question, but it is not testimony, certainly.

The Court: That's right, assuming the things

(Testimony of M. J. Holbrook.)

counsel has said to be true, then go ahead and ask the question.

Q. Assuming what I have said to be true, and in view of the fact you said you flew over this and inspected the ground from the air, can you say that this accurately portrays the property of Clarence A. Kolstad? [325]

A. At what angle was the picture taken?

Q. Well, I will look further, I need some assistance on that, vertical?

A. Absolutely vertical at right angles, I don't believe so.

Q. I don't believe so—within four degrees of absolute vertical.

A. On all portions?

Q. Yes.

A. It was blown up from what scale, which might cause distortions?

Q. These are contact prints.

A. You have blown it up how many times?

Q. No enlargement.

A. Your question?

Mr. Galles: Read my question, Mr. Reporter. I think I can save time that way.

(Question read by the Reporter as follows:

“Question: Assuming what I have said to be true, and in view of the fact you said you flew over this and inspected the ground from the air, can you say that this accurately portrays the property of Clarence A. Kolstad?”)

A. No, I cannot say it accurately portrays it. I

(Testimony of M. J. Holbrook.)

can say it is very similar to other photographs which I have examined and it is similar to my impression of that particular [326] area.

Q. Then, for the purpose of showing the breaks and the general contour of the land, and eliminating the purpose of this photograph to show the exact fields as of the date of taking, excluding that accuracy, does it portray what you viewed when you flew over it?

A. It portrays what I viewed, but not what you said. It portrays the breaks, but it does not portray the various elevations or terrain. It distorts the view of that. You have no way of relating from the river bottom through the breaks to the bench. You have no way of relating the general contour of the fields. You have a distorted view of the property. It does relate where the breaks lie, it relates the general land outlook, yes.

Q. It does that which you have stated accurately, or at least as you saw it?

A. I don't know whether it is accurate or not, I haven't had an opportunity to examine it sufficiently, but it is similar, yes, sir.

Q. Oh, I want to point out that the little portion on the left hand side is not relative in distance from the main portion because it has to be over another two miles.

A. That is a part of what distorts it to me. It is out of proportion.

Q. This half section should be over another, roughly, a foot [327] or 15 inches?

(Testimony of M. J. Holbrook.)

A. Yes, which makes the relationship different, or difficult to observe on a casual observation. That is one of the reasons why it isn't correct.

Q. Mr. Holbrook, do aerial photographs make the whole country look flatter than it is in reality? I believe you stated you couldn't tell terrain or elevations or the slope of the ground.

A. You can tell the general characteristics of the terrain, yes, other than the topography, according to the angle from which the picture is taken. It will have various gradations as to what will be shown in the way of elevation. This particular one, being taken four degrees from vertical, tends to make it look like a pancake.

Q. Like a pancake means it levels out the slopes and hills is in effect what you are saying?

A. Yes, it distorts the view as you would see it by eye as opposed to by photograph. Seeing it by eye, you have a chance to measure against different things and will have a chance to notice what the different degrees in elevation are.

Q. Referring to Defendants' Exhibit No. 10, being the plat of the joint ownership, there appears some cross-hatching, which I think Mr. Kolstad stated to us was roughly the area within the elevation of 2980 feet. Did you assist in putting on that portion of this exhibit, or having it done under your [328] direction?

A. Yes, partially under my direction. The schematic drawing which you see was prepared by a local engineer here in Havre.

(Testimony of M. J. Holbrook.)

Q. How much water was on this property at the time you flew over it and viewed it from the air, and at the time you inspected it from the land itself? A. Quite a lot.

Q. How many acres out of this joint ownership?

A. It would not be as great as the amount of taking because the total capacity of the reservoir had not been reached, so there was some lands which were not covered by water. In my consideration, I considered the entire portion of the property to be flooded, or to the taking line, whichever the case might be. It was the same one way or the other. The land was gone.

Q. When you say you consider the entire taking area to be flooded because it was gone, does that mean you didn't inspect any of the taken land that was not flooded when you saw it when you viewed the premises?

A. Yes, sir, I did, I even looked at the lake.

Q. I must have misunderstood you.

A. No, when you are on ground as an appraiser and trying to be observant, you will look at everything you can see, not only the property you are on, but adjoining property, and [329] all the things you think may happen, things you could anticipate may occur, so I saw the water and the extent of the flooding at that time, but insofar as giving it consideration in arriving at the before and after value, I considered that all of the land within the taking area was gone, whether it was covered by water, or whether it was taken as excess land by

(Testimony of M. J. Holbrook.)

the government to protect against eventual flooding and peak floods. Insofar as my determination of the lands which were covered in order to arrive at what I considered their highest and best use to be, I then had the benefit of photographs and related that to my observation of the terrain. I had production records, I had soil maps and topographic maps, and with these things, I could picture what had actually happened in the area which was under water.

Q. And, of course, the information that was furnished you, you assumed to be true because you did not obtain it of your own first hand information?

A. You make no such assumption in an appraisal until such time as you can arrive at an opinion based upon fact. You must weigh all of the evidence as to its validity. Some of the things I heard obviously weren't true, some of them I found to be conservative, but in the main, after having seen all of the things that I did, then I could arrive at an opinion of my own, which I did.

Q. Specifically, the number of acres of cultivated bottom [330] lands, of course, you had no way of determining that except what somebody told you?

A. That is incorrect.

Q. You found out from independent means?

A. All of my means were independent. The basis upon which I found it out was I had the benefit of accurate and good aerial photographs which clearly delineated what areas were hay; I had the

(Testimony of M. J. Holbrook.)

benefit of the exhibits of the previous trial; I had the benefit of the information in the Allotment Office; I had the benefit of information in two Assessors' offices; I had actual photographs taken on the property, eye level photographs as you or I would see them on the ground, so combining all those things, you can then arrive at an opinion, yes.

Q. You can make a pretty fair guess about what kind of land was there then without actually having seen it?

A. Yes, that is being done constantly. Many appraisals are made retroactive where land is covered by water or cities are built on farms. It is common practice provided you have sufficient information, and I certainly had a wealth of it in this case.

Q. When we consider good appraisal practices, however, if you have the choice of viewing the property before it is flooded as against waiting until after a good many acres have been flooded, the first is preferable, isn't it? [331]

A. I would say that is the easiest because then you rely upon your eye, which can be inaccurate. Going about it as I did, which can be the hard way, I had to prove out each step because I had never seen it. I think the method by which I arrived at the highest and best use was probably more accurate because it demanded more work.

Q. Did you see photographs. by that I mean sur-

(Testimony of M. J. Holbrook.)

face photographs—let me put it this way: What surface photographs did you see?

A. They were just occasional snapshots that happened to have been taken. It was part of the check of all the information that was put together. Several aerals were part of it, soil maps were part of it, topographical maps were part of it, production records were part of it, information within the Allotment Office was part of it. All of it had to fit together, each bearing upon the other, so you could fill out the whole.

Q. And, of course, you don't even suggest, I assume, that you saw snapshots of each and every part of this land that is now flooded?

A. Oh, certainly not, no, no.

Q. Did you see these photographs that have been introduced in evidence here?

A. Yes, I have seen them.

Q. And you used that along with the other information? [332]

A. Just as part of it, yes. It is only a part of the whole picture. It takes many things to arrive at an opinion.

Q. You don't know what the dates of the aerial photographs were that you used? I know there are some in existence by the Department of Agriculture that are 1941 aerals.

A. I have those photographs in my room, and I could determine that for you, but I can't remember it at this time, I am sorry, but I have that information in my room, and all of the aerals.

(Testimony of M. J. Holbrook.)

Q. Isn't it material or important whether an aerial photograph is taken 15 or 14 years before the date of taking, or within the last couple of years?

A. Yes, providing that was all you were relying upon, but that was only part of it.

Q. You had to determine how much weight to give the aerial photographs you did use, and part of that determination would be the date upon which they were taken?

A. Yes, it would be part of the consideration.

Q. Have you forgotten the date of the photographs, or don't you know whether you ever acquired it?

A. With the mass of information I collected, I have forgotten. I can get it for you, however, because I have the photographs.

Q. I noticed when you were qualifying that you stated you had never, at least I got the impression that you hadn't made [333] an appraisal in Montana before.

A. No, I stated in qualifying that I had done the bulk of my work in other states. I didn't state whether I had or had not done work in Montana before.

Q. But the bulk of your work has been in other states rather than Montana?

A. I consider my work is in the United States, Canada and Hawaii. I have not received the assignments in number from Montana that I have from other areas, that is correct. There is less work to do over here.

(Testimony of M. J. Holbrook.)

Q. What kind of a farm do you have? That surprised me that you were a farmer.

A. I guess I got to thank my grandfather for that. He homesteaded a section, and being one of his grandchildren, I ended up with part of it. It comprises 640 acres less that part taken by a county road, state highway, railroad, Bonneville Power, and such other things as impose themselves upon land, and it has operated up until recent years as a dairy operation on which we milk Shorthorn dairy cattle.

Q. What did you determine in this area to be the value of an animal unit?

A. I didn't arrive at a firm determination for the reason that most of this area is devoted to wheat raising. I have utilized in my work \$250 as the value of an animal unit, which is the minimum, in my opinion, of the market at the time. [334]

Q. Now, how does the value of an animal unit relate to the value of a cow?

A. It doesn't, it relates to the value of a steer, generally. It relates to the value of a steer, and there is an old archaic or old fashioned rule of thumb which says whatever the price of a steer is on the market, that that is the value of the animal unit. That is highly fallacious, the reason being it was based on a 1,000 pound steer. The bulk of the market today is smaller animals because of pre-packaging and smaller cuts, so the old rule of thumb is purely a rule of thumb. It is indicative, but it isn't being used as conclusive. It is just like a per-

(Testimony of M. J. Holbrook.)

son who would fire a shotgun rather than a rifle. It will cover, but not be right to the target.

Q. You will not say the value of a cow has no relation to the value of the animal unit?

A. Your question was incorrect. It isn't based on a cow, it is based on a steer. It is based upon a 1,000 pound steer and doesn't hold true any more.

Q. I guess it is immaterial, but I don't understand what the difference is between a 1,000 pound cow and a 1,000 pound steer, insofar as relating to forage and what they would eat.

A. There is a great deal of difference—insofar as what they would eat, yes. Insofar as the market is concerned, the steer will sell for more than the cow. I don't believe you [335] would order cow if you had the choice of steer. You don't use a poor thing, regardless of what it is, to determine market value. In determining animal unit value as it relates to the price of a cow, you are using some broad rules of thumb which are highly inadequate.

Q. Yes, but I want the jury here to find out just how the animal unit value in a cattle operation is computed in this matter because you did mention grazing and animal units.

A. Well, the accurate way to determine it, in my opinion, is to find sales of comparable properties, determine the carrying capacity of that property, divide it by the number of animal units which it would carry, which will then give you the animal unit value.

(Testimony of M. J. Holbrook.)

Q. And did you determine what the carrying capacity of this general area is or was?

A. Yes, the general area, and also the specific areas of each of the three farms.

Q. And what is that?

A. In my opinion, the carrying capacity of the Clarence Kolstad place is 165.

Q. Now, that was broken down to an average of how many acres per animal unit?

A. It is broken down to the average of the different acreages. Each type of acreage would carry a different amount. I carried it basically on this basis: I carried it [336] on the basis of one animal to 30 acres in the out and out grazing; I carried it on the basis of one to 15 in the bottoms; I carried it on the basis of—I have forgotten exactly now, but I think it was about one to 3.3 in the alfalfa; I carried it on the basis of one to 40 in the crop land, so then the composite of each of those units as broken down added back together gave me 165 animal units for the Clarence Kolstad place, which, at \$250 an animal unit is \$41,250, as opposed to the \$35,900 which I placed on it for grazing, and I used the minimum animal unit value.

Q. You say the best test of market value is comparable sales?

A. No, I don't say that, I say it is a test. It takes more than just comparable sales.

Q. Now, in going to appraisal practices, that is one of the best tests, isn't it, what similar land in the area is selling for?

(Testimony of M. J. Holbrook.)

A. It is one of the best tests. The income approach is one of the best, and the cost or summation test is one of the best tests. It is dependent upon the quality and quantity of the information you can get; it is dependent upon what you are trying to find; it is dependent upon all of those factors, so any one approach by itself is not necessarily the best approach. It may be better under some circumstances.

Q. Well, now, when you say cost or summation approach, that [337] means in effect what Mr. Kolstad was doing, taking so much of a certain type of land at so much an acre, and he finally adds up the various classifications and comes to a total?

A. That is not my opinion of the summation approach. My opinion of the summation approach is the determination of the value of the land by comparison in the market, or by the income approach, plus the depreciated value of all improvements.

Q. Well, then, maybe I don't understand. There are three methods you have mentioned of arriving at fair market value, and I thought you said the cost or summation approach was one?

A. That is correct.

Q. All right, now, what goes into that approach?

A. Your cost or summation approach is the value of the land established by comparison in the market place, or by the income approach, plus the depreciated value of the improvements, if any. That is where the word "summation" comes from. You add the value of the land to the value of the im-

(Testimony of M. J. Holbrook.)

provements. That is what "summation" means in that approach.

Q. The second method is market approach?

A. It could be, there is no set order for them.

Q. You have already mentioned the market approach and summation approach——

A. You will find no clear cut distinction between all of [338] them because all an appraisal is is a matter of comparison. Your clear lines of distinction are based upon the tools you use to process your information.

Q. Is this a fair statement, Mr. Holbrook, that the cost approach, that is what it costs to get the various component parts of the whole? Is that a fair definition of the cost approach?

A. Well, I would interpret it far differently than you do—yes, it is a fair definition. I would however prefer the definition that the cost approach is based upon the value of land, established from comparison or through the income approach plus the depreciated value of improvements. I would say that was a fair definition.

Q. I understood the income approach was another entirely different and separate approach?

A. Well, as I stated before, they are all alike and overlap in places, but it is a third method, yes.

Q. So there are three approaches, whether you use them all at once or separately or as checks, the cost, the income, and the market?

A. I am afraid I haven't explained it very clearly to you because you don't use them all at

(Testimony of M. J. Holbrook.)

once. You do use them as a check against one another. What I was trying to explain to you is there is an overlap of information utilized in each one of the three. They are three separate and distinct [339] steps.

Q. Now, in the income approach, did you use that as a check in this case? A. Yes, I did.

Q. And did you use 22 bushels to the seeded acre as the average? A. No, I did not.

Q. What did you use? A. 21 bushels.

Q. 21 bushels?

A. Yes, and I also checked it against 24 bushels.

Q. You, of course, divided that by two to get the income from the cultivated acres?

A. Well, yes, because of summer fallowing, if that is what you mean.

Q. Yes, that is what I mean. So you get $11\frac{1}{2}$ bushels that is taken from—that is attributable to all of the land, even though it comes from just half of it? A. Yes.

Mr. Schiltz: Your arithmetic is a little off. $11\frac{1}{2}$ bushels would be 23.

Q. Ten and a half, I am sorry. How much of the $10\frac{1}{2}$ bushels do you attribute to the land?

A. One-third.

Q. What is one-third of $10\frac{1}{2}$?

A. Well, 3.50, roughly. It isn't quite that much because [340] one-third of 10 is 3.33, and one-third of a half is .16, so it would be 3.50.

Q. It is exactly 3.50. All right, how much do you

(Testimony of M. J. Holbrook.)

have to deduct from that third as chargeable to the land? A. Taxes.

Q. Any thing else?

A. No, there is no other charge to it, this is pure rent.

Q. What are the taxes?

A. I utilized the figure of 25 cents an acre, although I found that varied in this land from eight cents to 31 cents. I kept it on the heavy side, over and above the actual taxes, anticipating that they would go higher in the future.

Q. What figure did you use in your deductions?

A. Twenty-five cents.

Q. Isn't the land owner entitled to, say, some mileage, to go out and view the premises as farmed by the tenant, assuming he owns it as an investment?

A. I don't see where that has anything to do with the land value.

Q. So, you come out with \$3.25 an acre of the cultivated acres that the land earns?

A. Well, according to your calculations, yes, it would be \$3.50 less 25 cents for taxes would be \$3.25.

Mr. Schiltz: I think there is some confusion here—— [341]

The Court: Maybe you are confused, but maybe they are not, and if the witness can answer the question, he will answer, so apparently he is not confused.

Mr. Schiltz: I am confused.

(Testimony of M. J. Holbrook.)

The Court: Continue. Don't interrupt counsel.

Q. Let's see, what do you come out with then as the net return of the land?

A. Well, under your problem, I have been running it in my mind, I think it is \$3.25, but I don't know, because we are working your problem, not mine.

Q. I want it related to this land. I am not giving you a hypothetical case.

A. You were.

Q. I think counsel is right, I got mixed up. You used 21 bushels?

A. Let me get my actual computations.

Q. Twenty-one bushels yield is not hypothetical, is it, Mr. Holbrook?

A. No, 21 is what I told you I used, 21 and 24.

Q. What do you mean by that answer, you used 21 and 24?

A. Just that, I used 21 bushels on one basis and 24 on another.

Q. You mean on different land?

A. The same land. I didn't say I utilized this as conclusive evidence. I said I used it as a [342] check.

Q. All right, that is what I want to know. I don't want hypothetical questions. We want to find out just the information you used.

A. I don't ask the questions, you do.

Q. All right, now under what conditions—what is the 24 bushels to the acre?

A. That was my opinion in checking the poten-

(Testimony of M. J. Holbrook.)

tiality of this particular area and the land because the crop history has indicated that the yield per acre has been continuously increasing, and it has increased as the moisture depth has penetrated into the soil due to the summer fallowing and good agricultural practices, so that where 10 or 12 years ago you had a yield of 14 or 15 bushels per acre, today you have a yield of 19 or 20 bushels per acre. You can anticipate all things being equal, that should continue to increase to some degree. That has been the history in all this particular area, and it is evidenced by the crop history. There are some things which will cause increased yields for specific years. If you have more moisture in certain years than others, the tendency is to have a greater crop, but this land is becoming richer in production continuously due to summer fallowing and good agricultural practices, so I tested it on 24 bushels to see what might be anticipated in the future.

Q. That would be speculative?

A. No, because this land has produced as high as 40 bushels [343] under certain conditions.

Q. That was in years when they had good rainfall during the growing season?

A. That's right. The general tendency of the land, however, is an increase in production is what I am trying to say, which the production records made available to me indicated. Those records indicated 22 bushels to the acre. I do have every reason to anticipate, historically, however, that will in-

(Testimony of M. J. Holbrook.)

crease again. I didn't use 24 as being my figure. It was one of several which I used.

Q. What did you say was the minimum rainfall during the growing season that is required to raise the average crop?

A. I didn't say during the growing season.

Q. Do you have an opinion on that?

A. The minimum rainfall for crop certainty is nine inches. At eight inches it is beginning to become probable. I would say you have got to have at least five to six inches at the most critical times of growing, and you would be at that getting down to the marginal level.

Q. This morning you mentioned some amount of rainfall during the growing season. Do you recall what that was?

A. I don't recall, no, sir.

The Court: Court will stand in recess until 20 minutes after 3.

(Jury admonished.)

(10-minute recess.) [344]

Q. As I recall, you said this morning that it required a minimum of 8 and 9 inches of rainfall, mostly during the growing season, to sustain the averages you consider to be proper?

A. I believe that statement is essentially correct. I said 8 to 9, not eight and nine, of which the bulk of it would have to fall during the crop growing season.

Q. By bulk of it, do you mean all but one or two inches or 60 per cent of it?

(Testimony of M. J. Holbrook.)

A. Well, what kind of crop do you want?

Q. Winter wheat.

A. I have said the minimum, which I set at 5 to 6 inches, would be, in my opinion, at a point beyond which it would be highly speculative. If you ever got a crop, obviously, the more you could get in that period, the greater production, other things being equal.

Q. Now, in 1949, according to the Joplin weather station, and I assume you checked the rainfall at the Joplin weather station?

A. Yes, I did.

Q. Do you have those figures with you?

A. I have them among my notes.

Q. Well, according to my information in 1949, there was 5.95 inches during the growing season, with a total of 8.2 inches for the whole year. [345]

A. That is the Joplin area. The Joplin area is not the Chester area. There could be a tremendous amount of difference in rainfall. The difference between rainfall between Shelby and Dunkirk is a couple inches, and the same thing can happen over at Joplin, so the rainfall at Joplin, I don't accept as being the fact at Chester. If you are trying to draw some comparisons, give me the rainfall at Chester, and I could give you a conclusion.

Q. Do you have that? A. No one does.

Q. It could be less than this one or more?

A. If you would go on precedent, what has happened, you would find it was more, but it could happen it was less, I don't know.

(Testimony of M. J. Holbrook.)

Q. Well, now, assuming that the average production in 1949 from these lands involved here was, and I will state that a witness will come on that will verify this—was 12 bushels to the acre, harvested acre, that would indicate that it was a fairly low year of rainfall during the growing season, wouldn't it? A. Not necessarily.

Q. It wouldn't?

A. No. You would look to that, yes, but it might also be newly broken land which would have very low production; it might be hail hit and took out part of the crop; it could have [346] been a fire in the area. There are a whole lot of things you could look for that can reduce your yield besides rainfall.

Q. In 1952, Joplin shows 5.48 inches during the growing season, and that year, the tenant on these particular lands, and assuming he will testify the yield was an average of 13 bushels to the acre, so generally there is in these particular years a definite comparison between the rainfall reported at the Joplin station as being low, and the production obtained from these lands?

A. Of a particular farm?

Q. Yes, these lands.

A. You are absolutely wrong. If you are going to hang your hat on a conclusion such as that, you are making a mistake, a bad mistake. If hail had come and taken out half of the crop after you had come up with 10 bushels, you would be wrong. There are too many factors could reduce the crop. I don't know how much hail, I don't

(Testimony of M. J. Holbrook.)

know how new the land was, I don't know if there was that amount of rain at Chester, the same amount as there was at Joplin, I don't know the difference in yield, with the result you are building up with a completely falacious line of reasoning. I don't think it has——

Q. It has no bearing on it?

A. Yes, it has a bearing like one finger is part of my hand. I can't give it any more weight than that. [347]

Q. You think it has very little relationship, the fact there was low rainfall in 1949 and 1952 at Joplin in connection with the low yield from these lands?

A. It is indicative, it would lead you to take a look at what happened. After you have limited all the other things like hail, summer fallow, new land, what kind of seed, after all of that is eliminated, I would agree with you, but it is only one of a number of things to consider. You can't say one note makes a song.

Q. You mentioned new land. I assume you believe new land affects productivity?

A. Of what?

Q. Of wheat from that land, from the new land?

A. Yes, that is correct.

Q. For a few years? A. That is correct.

Q. And after that it is better than land that is old land?

A. I don't know that I agree with that.

Q. You think the land doesn't build up in its

(Testimony of M. J. Holbrook.)

production right after it has been planted for a few years and then stay relatively level and then after 20 or 30 or 50 years lower in production, assuming no artificial fertilizers are applied to it?

A. That is a very generalized statement. Insofar as dry land farming in the Chester area is concerned, it is my [348] opinion the productivity will continue to increase with proper farming practices because of summer fallowing, which is primarily to get humus and moisture into the earth. The moisture will keep getting deeper and deeper and deeper with the result that in the early years in which you assume you have the greatest soil content and would get the greatest crops, you don't have as much moisture. Actually, your crop will continue to go up. When you hit a year of lower rainfall with more moisture in the ground, you can weather those periods.

Q. For how many years of low rainfall?

A. Well, how much water in the ground? Everything is relative. You can't reach up in the sky and say how much it will endure without qualifying it.

Q. All right. Suppose now we have 10 or 11 feet—10 or 11 inches of rainfall during the growing season for the last five years—except for—say four years before last year. Last year it was reduced to about eight inches, and suppose next year and for the next four years, it is from five to six inches during the growing season. Now, will that productivity of the land in the Chester area and particu-

(Testimony of M. J. Holbrook.)

larly these lands be affected by that lack of moisture?

A. Yes, there would be that tendency. You have missed my point, however. In the older lands that have built up a greater amount of moisture, more than the newer lands, their [349] ability to carry through the lesser years is better than lands that hasn't built up a greater amount of moisture, so while the production average might go down, the level of production will be better on the older land which has stored up more moisture than it will on the newer land which hasn't the moisture stored in it. Therefore, older land which has stored moisture under proper farming practices in this area can be much better land than newer broken land. That is why new land in the first year, unless other conditions intervene, won't have the yield. It hasn't the moisture, you don't have the organic material within the soil; you haven't built up nitrogen in it, you haven't built bacteria into it. There are a lot of other factors.

Q. Do you know how much of these three parcels is newly broken land?

A. Well, from 1910, all of it.

Q. All right, from 1947?

A. No, I don't know, except from the maps. The most accurate thing I have is the breakdown as of the date of taking.

Q. Do you know how much had been broken since 1947—excuse me—strike that, please. On the date of taking, do you know how much land had

(Testimony of M. J. Holbrook.)

been broken since 1947? A. No.

Q. In these three parcels? [350] A. No.

Q. Would that affect your opinion, if considerable had been recently broken?

A. It would if I didn't have production records, which I did. The production records answered that question for me.

The Court: Let me ask you, does your answer mean that if land had been broken just within the last five years that its value on the market is less than land that has been broken for 10 or 15 years?

A. Not necessarily, sir, freshly broken land will not normally produce as good crop as older land will.

The Court: Immediately?

A. But it has the same potentiality.

The Court: So it has approximately the same market value?

A. That is correct. When you value a farm, you value the whole farm. You don't say, "That is 100 acres, and these are this," a farm is bought and sold on the average per acre.

Q. (By Mr. Galles): But newly broken land the next few years, if they were drought years as is happening in Kansas and Texas, it would definitely be shown in the production that they weren't as valuable lands from the production standpoint, as compared to the old land which would have that reservoir of moisture?

A. I didn't say that. [351]

(Testimony of M. J. Holbrook.)

Q. I am saying it. I want to know if you agree?

A. No, I don't. Texas is primarily ranch land, and the problem is different than with wheat. Kansas is corn and wheat. Kansas is not all dry land farming. This is all dry. The practices and accumulation of rainfall will be different here than in Kansas and Texas.

Q. Is Kansas all ranch land or farm land?

A. It is all farm land.

Q. Farm land, and they are having trouble there because of drought in the last few years?

A. They grow wheat, corn and other products, but it is not land you can compare to this.

Q. You said you looked at 100 sales and discarded what, practically all of them? A. Yes.

Q. How many did you give weight to?

A. Three.

Q. And was one of those the sale from Kelly Kolstad to Louise Ray that was offered this morning?

A. Yes, I talked to the principals in that. I also examined the farm.

Q. And you gave it weight. Did you give it complete weight or use the same per acre value in applying it to this land, after talking to the parties and considering the fact that that contract wasn't carried out? [352]

A. I think that is rather obvious from what I testified to. That was approximately \$133 an acre across the board. I have come in at \$82, \$72.50 and \$56 across the board.

(Testimony of M. J. Holbrook.)

Q. Across the board. When you have all but 20 acres that is cultivated and if it is nicely blocked out, why that is practically saying what the value of cultivated land is, isn't it?

A. No, not to me in this case because I don't consider that land was as good land as this. It doesn't have the history of production which is as good; its soil tends to clay; it is winter wheat now, but it could very easily—it is marginal, and it could be into spring wheat. Therefore, I don't think it has as great a value as do the Kolstad properties. There were also improvements on that property which you would consider.

Q. All of which has to be taken away from the total price in order to find out what the value of the land is?

A. They are weighed and balanced and considered, yes.

Q. Yes, as I have it in my notes, in that particular sale, you considered there was 1,880 acres, out of which only 20 or 30 acres were not cultivated?

A. Yes. As a matter of fact, I didn't even think there was as much as that not cultivated. My general thinking of it was it had more cultivated acreage and was well blocked.

Q. You mention that was a well-blocked farm, that is, the [353] shape of it was good, practically rectangular?

A. I would say it was good, but it doesn't com-

(Testimony of M. J. Holbrook.)

pare with the Kolstad property because of the difference in size and difference in soil.

Q. You think the shape of the fields in the Kolstad properties is as good as a rectangular piece of property 1880 acres large like the Kelly Kolstad property?

A. I can pull an 1,880-acre field out of the Kolstad properties and say, "Here is the equivalent." They have more than that. The blocking in the Kolstad property isn't ideal by any means, but it is good. It has got problems like any other ranch does.

Q. How many appraisals have you made in Montana other than this one? A. Two.

Q. Farm lands? A. One.

Q. What locality? A. Highwood.

Q. Around Great Falls?

A. Yes, about 35 miles out of Great Falls.

Q. That is one of the best wheat land areas in the state?

A. Part of it is wheat land; part of it is cattle also.

Q. How large a place?

A. I don't recall, about 35 or 36 hundred acres.

Q. When did you make that appraisal?

A. About three years ago.

Mr. Galles: That is all.

Mr. Schiltz: No questions.

The Court: I wonder, Mr. Holbrook—you were shown an aerial map marked Exhibit what?

The Clerk: Twenty-one, your Honor.

(Testimony of M. J. Holbrook.)

The Court: Can you read that map, that aerial map?

A. I can recognize it, your Honor, but you can't read it accurately for a number of reasons. One of them is that it was cut on the boundaries so you can't relate it to the land which adjoins it. Land, of course, has continuity to it. You could get a good general indication, but I wouldn't go beyond that because it is too restricted and distorted. I could get something from it, yes.

The Court: Could you take that map and read it and relate it to the maps, Exhibits 5, 7 and 10?

A. Generally, yes.

The Court: Well, will you do that, point out on that map the land that is delineated on the exhibits?

A. This portion in here (indicating) on the aerial photo, which is a small portion attached to the right with the legend that it is approximately two miles away, which is not correct on this map, and outlined in the broken line, which means the remaining land, would be this area in here (indicating). [355] The Marias River is shown on the southerly boundary through here, this being a portion of the breaks, this a portion of the breaks. This bottom land in through here would relate itself to the river in through this area here, which is indicated as bottom land in here and tillable land in through here, and grazing land in these portions (indicating).

The Court: Now, referring to the map, the

(Testimony of M. J. Holbrook.)

aerial map, Exhibit 21, can you delineate those same types of land by reading that map?

A. Generally you can, your Honor. There is one problem. This was taken at an altitude and at a scale which makes it exceedingly difficult. If you were reading a soil map with it and a contour map with it, it would begin to come in. For instance, it is very obvious up in here (indicating), these are cultivated fields, and you know from being over the land that is all in wheat. You can readily identify it when you get in the breaks from having been in the breaks and around the breaks. You know generally what is growing in there. It is pasture land. When you get down in here, you can notice how it tends to level out, it shows a different coloration, which is indicative that you have got a different type of vegetation, you have got it different than, for instance, grazing land in here, so you know it must be bottom land. Then, it is kind of—whether it is bottom cultivated or not—not on Clarence's place, he didn't [356] have any cultivated bottom. On the other bottoms, it would show the areas which have been cultivated. Then, knowing the crops which are common to your bottom lands, you could select the area, and in order to determine the total area, if you knew the scale, you could run the planimeter on it and come up with the exact acres.

The Court: You can't make an exact reading on that map?

A. This map, no.

The Court: That is all I wanted to ask. If coun-

sel want to ask any additional questions, they are at liberty to do so. Mr. Galles, do you want to ask any further questions with reference to that?

Mr. Galles: This map, of course, is not offered for the purpose of showing acreage or the acreage in the various fields.

Mr. Wiggenghorn: It hasn't been offered at all, may I suggest.

The Court: It hasn't been offered at all. You used the map in cross-examining the witness. I wanted to bring out whatever further information was available.

Mr. Galles: No further questions.

The Court: Does counsel for the landowner wish to ask anything further?

Mr. Schiltz: No further questions.

(Witness excused.) [357]

W. J. CARROTHERS

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schiltz:

Q. For the record, will you state your name, please? A. W. J. Carrothers.

Q. Where do you live, Mr. Carrothers?

A. Spokane, Washington.

Q. What is your occupation?

A. Real estate appraiser.

Q. Tell us something about your appraisal ex-

(Testimony of W. J. Carrothers.)

perience from the time you got into the appraisal profession?

A. Well, my first appraisal experience started in 1926, and from 1926 for approximately five years, I was employed by an appraisal company known as James J. Staffords and Associates, during which time we appraised the City and County of San Francisco, Alameda County and Vallejo in California, and the entire group of Hawaiian Islands for tax purposes.

Q. In this appraisal, were you appraising for fair market value in this type work?

A. Yes, we were appraising fair market value, from which the Assessor obtained his figures for equalization purposes, and this encompassed every type of real estate within the area [358] we were appraising.

Q. Will you continue, please, with your experience?

A. Subsequent to my completion—the last assignment I had with them was the Hawaiian Islands. Subsequent to the completion of that assignment, I returned to the mainland, and was the Assistant Division Appraiser for the Home Owners Loan Corporation in Northern California, appraising principally properties for resale, that is, properties which had been foreclosed, for resale to the general public, and subsequent to that I was a real estate broker and salesman in California, during which time I also did appraisal work. At the time just prior to the war, I was employed as Review Ap-

(Testimony of W. J. Carrothers.)

praiser in the Corps of Engineers, with the Corps of Engineers, in the Division Office at San Francisco. I appraised and reviewed appraisals during the acquisition period prior and during the early stages of the war in California, Utah, Washington, Oregon, Nevada and Arizona. Subsequent to that employment, I was employed for approximately three years with the Office of Price Administration Rent Control making studies of multiple rental units such as large hotels in the Western States, the large motels and that type of thing; and also made studies to determine the rent generally prevailing in those areas, which was determined largely by a matter of comparison and the actual rental history of these various properties and areas; and subsequent to that, I was the [359] Assistant Regional Appraiser and Regional Appraiser for the War Assets Administration for the western part of the United States, that is, the West Coast states, and we were during this time appraising for the market value, that is, to determine the market value of such things as shipyards, large industrial plants and so forth, for resale for substitute uses; in other words, to try to find a substitute use for these plants, as the use for which they were built no longer existed after the war emergency had passed. At the completion of that assignment, for approximately two and a half years, I was employed as an appraiser, principally—that is, by the Corps of Engineers—principally at McNary Dam where I appraised the entire Columbia Irriga-

(Testimony of W. J. Carrothers.)

tion District and a great many private ownerships, principally farm land and residential properties along the Columbia River.

Q. How many acres were involved in that appraisal, Mr. Carrothers?

A. That I couldn't say. There were approximately 5,000 ownerships under the McNary Dam, but as to the acreage, I haven't an accurate record of it.

Q. All right, go ahead.

A. I resigned my position with the Engineers in 1951, and since that I have had my own appraisal business, now headquartering out of Spokane, Washington. During these past, a little over five years, when I have been so employed, I [360] have appraised in the northwestern part of the United States, that is, Oregon, Washington, Idaho and Montana, and the territory of Alaska. My last assignment was the appraisal of the entire Alaska Communications System, and the appraisals in the other states that I have mentioned have been largely agricultural lands, with some suburban and urban lands, particularly in Spokane. During this period I have appraised wheat lands in Oregon, Washington, Idaho and Montana.

Q. Will you give us a representative list, without going into too much detail, of some of the clients for whom you have done appraisal work since you have been in your private business?

A. I have appraised for the Corps of Engineers, for the Alaska Communication Service, for the De-

(Testimony of W. J. Carrothers.)

partment of Justice, in Idaho, in Montana, and in Washington, and the State Highway commissions in Washington and Idaho and various individuals.

Q. Have you qualified as an expert appraiser in State and Federal Courts?

A. I have in the State and Federal Courts in Washington and the Federal Court in Idaho, the State Courts of California, and a Commission in Montana, a federal commission.

Q. Mr. Carrothers, did you have occasion to appraise lands in Toole and Liberty Counties because of the condemnation cases occasioned by the construction of the Tiber Dam? [361]

A. Yes, sir; I did.

Q. And how did you come to make those appraisals in Toole and Liberty Counties?

A. I made the appraisals in Toole and Liberty Counties at the request of the Department of Justice.

Q. How many acres did you appraise for the Justice Department in this area, do you have any idea?

A. I imagine approximately 17 or 18 thousand acres.

Q. How many different tracts? A. Nine.

Q. Among those tracts you appraised, were the lands of Clarence Kolstad and Alta Kolstad and the joint lands of Clarence and Alta Kolstad included?

A. Yes.

Q. Did you appraise them as three tracts?

A. I did not.

Q. You appraised them as one tract?

A. That is correct.

(Testimony of W. J. Carrothers.)

Q. In a minute, we will ask your opinion as to the individual tracts, but I want to get the background of how you went about appraising those lands. When did you come into the area?

A. I first came into the area in May, 1956.

Q. Let me ask you if the dam had begun to back up water at that time? [362]

A. Yes; it was. That was the reason I came in May. I made a special trip in order to try to see all I could before the property was flooded, although when I arrived, some property was flooded.

Q. What was the extent of the flooding?

A. Well, in the properties which I was asked to view, the lands, that is, the river bottom lands in the mouth of Willow Creek and up the creek a short distance, and up the Marias River to approximately three miles had been flooded as near as I could tell.

Q. When you came on the land in May of 1956, how did you go about appraising the lands?

A. I at that time merely made a field inspection of the land and viewed the land.

Q. Did you do that on foot?

A. No; I did it mostly by automobile, and by foot, yes, but the time was limited, and the purpose of this view was a general view which I took in company with representatives of the government.

Q. That was the extent of what you did in May, 1956? A. That is correct.

Q. Then did you return to the property and do something more?

A. Yes; in August, I returned.

(Testimony of W. J. Carrothers.)

Q. That is 1956? [363]

A. Yes; August of this year, and made my detailed appraisal study.

Q. What was the extent of the study you made, what information did you seek to find?

A. Well, first was to complete my inspection of the land in a more detailed manner, that was the first thing I did. Then I followed the normal appraisal practice of, in my own mind, determining what the highest and best use of these lands was; then I attempted to find all available data affecting market values within the immediate area, and to this end, I was furnished, of course, the legal descriptions and maps.

Q. Showing the various ownerships?

A. Showing the various ownerships, and maps of the area, both the immediate area and the immediately adjacent areas. I viewed aerial photographs and soil maps and other data pertaining to land uses, land types, topography and so forth. I had—it was made available to me which saved me considerable time—the sales in the two counties which I then analyzed, and——

Q. That is, sales of other lands?

A. Of other lands in the community within the past five-year period, I should have said. I inspected these lands to see if in my own mind I could use them or could not use them as comparable sales in attempting to make the usual analysis you do on comparable sales. [364]

(Testimony of W. J. Carrothers.)

Q. Which lands do you mean, the lands involved in the sales?

A. Yes; I inspected the lands involved in the sales.

Q. What did you find with regard to land values as reflected by the sales you examined?

A. I found in this area as in many of the other wheat areas that I have made studies of in the past two to three years that there are few, if any, desirable units on the market, and that there are few, if any, of the better producing lands being exchanged on the present market. This is due to the present situation, not only in this area, but in other wheat growing areas and the stability of the market, and the fact that during the past 10 years—it is pretty general in such areas—that production has increased considerably, some claiming that during the past 10 to 15 years, their production has doubled, and that has made this type of land and the owners of this type of land reluctant to sell.

Q. Did you find any trend in land values in this particular area?

A. I found a definite trend upward. In other words, sales up until the past two years or a little better show a markedly less per acre value than the more recent sales.

Q. Do you think—has there been any indication of a stabilization of land values in this area?

A. I think they are beginning to stabilize, if I may put it that way. [365]

Q. Had they stabilized as of May 24, 1955?

(Testimony of W. J. Carrothers.)

A. I don't believe they had; they were in the process, but they had not stabilized as reflected by the current sales.

Q. In your examination of this area in your efforts to determine fair market value of the lands in this area, did you take into consideration soil classification, rainfall, depth of soil, and that sort of thing?

A. Yes; certainly.

Q. Did you find any difference between the lands south of the Marias River and those north of the Marias River?

A. Well, in this immediate area, the lands south-erly of the Marias River are lighter soils, and the lands to the north, particularly across the Great Northern Railroad, apparently are lower producing lands.

Q. What crops do they produce up there?

A. Spring wheat rather than winter wheat.

Q. And as you get further south from the Great Northern Railroad, you run into winter wheat country, is that right?

A. That's right. I saw some areas south of the Great Northern having a considerably higher clay content than the subject area, and they have a tendency to bake, which is not too good for winter wheat.

Q. Now, when you refer to the subject area, generally what area are you talking about?

A. Well, those lands that I was appraising adjacent to the [366] Tiber Reservoir.

(Testimony of W. J. Carrothers.)

Q. That would be the 11 ownerships to which you referred previously?

A. Yes; that is correct.

Q. Now, then, directing your attention to the Clarence Kolstad land, in the course of this appraisal, did you—let me ask you first how much time did you spend in this area altogether?

A. Well, altogether I have spent better than a month. This last time I have spent approximately two weeks in the field on the field examination.

Q. Now, then, referring to Clarence Kolstad's land, are you familiar with it?

A. Yes; I am.

Q. Did you inspect and examine and study his lands along with other lands? A. I did.

Q. That was one of the ownerships you were examining? A. I did.

Q. You are able to distinguish between Clarence's lands and Alta Kolstad's lands and the joint lands of Clarence and Alta Kolstad, are you not?

A. Yes.

Q. Have you appraised for Mr. Clarence Kolstad his lands for their fair market value as of May 24, 1955, before taking? [367] A. Yes.

Q. Now, how did you go about appraising those particular lands?

A. Well, the process is the same as for all of the others, the difference being that for this or any other particular land, and I did in this case, classify the lands according to a use classification.

Q. You had all your basic information for ap-

(Testimony of W. J. Carrothers.)

praising these lands, it was just a matter of breaking it down then into a use classification, is that right?

A. Well, I had the basic data, as I said, from a previous study I had made, but there are a considerable number of differences develop when you break any large area down into smaller portions.

Q. How many acres of land did you determine Mr. Clarence Kolstad had before the taking on May 24, 1955? A. He had 5,180.7 acres.

Q. And out of those acres, how many of those acres were cultivated?

A. Well, there were 2,551 acres of cultivated land.

Q. Did you make a classification of tillable land?

A. That was one of my classifications, yes, sir.

Q. How many acres of those were tillable?

A. 840.2 I have.

Q. Then how many acres were bottom [368] land? A. 580 acres.

Q. How many acres of grazing land?

A. 1,209.12.

Q. Now, are you familiar with the maps that have been used here to show the lands of Clarence and Alta Kolstad and their joint lands?

A. Yes.

Q. These figures you have given, are they in substantial agreement with the designations as shown on this exhibit of the Clarence Kolstad—

A. Let me say this: These classifications are my own classifications, but I find upon examination

(Testimony of W. J. Carrothers.)

of the map they are substantially in agreement with the classifications shown there.

Q. Now, then, after the taking on May 24, 1955, how many acres were left to Clarence Kolstad?

A. 1,400 acres.

Q. How did those acres classify by use?

A. They were the same classifications. I have broken them down a little differently. They are wheat land, tillable, grazing and so on.

Q. How do they break down?

A. 96.3 acres of wheat land in one category that I have, and 711.2 in another. Those are both wheat lands.

Q. Why do you break them down into two categories? [369]

A. Well, because, in my opinion, after the take, the residual value is less in one instance than the other.

Q. You can refer to the map if you like.

A. Well, may I step down to the map? I can point it out there. These areas were cultivated land (indicating). There is 96 acres——

Q. Excuse me a minute, Mr. Carrothers. You are now referring to Defendants' Exhibit 5, is that correct?

A. Correct.

Q. Now, go ahead.

A. These, you will notice, are isolated small acreages of cultivated land, and those areas are 96.3 acres which I have in one category of wheat land. In my estimation, those small isolated fields after the taking are much less desirable on the market

(Testimony of W. J. Carrothers.)

than they would be if they were contiguous to the other fields and you wouldn't have to move your equipment a considerable distance from the other fields which may be cultivated. It tends to make it a more expensive operation, and in general makes it less desirable. I did not reduce the market value of the remainder as greatly because in my opinion you have larger fields and they are more economical to cultivate, and would be more desirable on the market to any prospective purchaser of this type land.

Q. Now, then, further breaking down the remaining lands, how did you classify it, how many acres? [370]

A. If you will notice, there are two 40's south of the river. I think they can be seen. They are the only ones south of the river, and these small fields—mostly they are tillable lands, although at the present time, or at the time of taking, they were not cultivated, but those acres on that side of the river, in my estimation, have a low marketability due to their lack of size and isolation from other lands of the same ownership.

Q. As they now stand after the taking?

A. Yes; we are speaking now of the lands after the take.

Q. And the lake is also between them and the rest of the land?

A. That is correct. They are not accessible except by a very roundabout way.

(Testimony of W. J. Carrothers.)

Q. Now, of the remaining lands, what other categories did you have there?

A. Well, I have tillable lands and grazing land, tillable lands north of the river.

Q. How many acres of that?

A. There is 170 plus 115.8.

Q. Why did you distinguish that?

A. If you will notice, the northwesterly tracts there comprising 170 acres are again isolated, and the travel and isolation make them less desirable, and size, too.

Q. Now, then, how many acres of grazing in the remaining? [371]

A. 236.7. Those lands, in my estimation, have no particular utility because of their isolation from sources of stock water due to the intervening ownership between them and the river after the taking, and the size, and the fact that they are only desirable as dry grazing land, and they are completely out of balance as a stock operation, and I don't think now it would be suitable for raising stock.

Q. In your appraisal of these lands, did you consider the productivity of the land?

A. I did.

Q. Then, Mr. Carrothers, based upon the matters and facts to which you have testified, including the description of the land, your classification of the highest and best use and the productivity and size, do you have an opinion of the fair market value of the Clarence Kolstad lands before taking on May 24, 1955?

A. I have.

(Testimony of W. J. Carrothers.)

Q. Now, what is that opinion?

A. \$410,500.

Q. Now, similarly, do you have an opinion of the fair market value of the Clarence Kolstad lands after the taking on May 24, 1955?

A. Yes, sir.

Q. What is that opinion?

A. \$103,500. [372]

Q. The difference between those is \$307,020?

A. That is correct.

Q. Now, that, in your opinion, is the damage in the taking from the Clarence Kolstad land?

A. Correct.

Q. Had you determined what the across-the-board value of those lands was before the taking?

A. Approximately, yes, sir, \$79.

Q. \$79? A. That is correct.

Q. Did you determine the across-the-board value after the taking?

A. Yes, sir; \$74.

Q. Now, then, within these various classifications of plowed, tillable, bottom, grazing, and alfalfa, do you have an opinion, based upon all of your experience in this area, of the unit value of these various categories?

A. Yes, sir.

Q. What is that, please?

A. On wheat land, I feel that the average value is \$115 per acre.

Q. Continue with the other classifications.

A. Tillable land, \$100 per acre; bottom lands, that is, undeveloped bottom land, \$35 per acre; alfalfa lands, \$125 per acre; the dry land grazing lands, \$10 per acre. [373]

(Testimony of W. J. Carrothers.)

Q. Now, directing your attention to the Alta Kolstad lands——

The Court: Pardon me; may I ask a question, first?

A. Yes, sir.

The Court: With reference to the westernmost tract that you referred to of the Clarence Kolstad land, did you attribute any value to that land before the taking?

A. Yes, sir.

The Court: As I understand, you say you didn't attribute any value to it after the taking?

A. No, sir. I had before the take—let me explain it this way: For the tillable land—let's take one category, tillable land at \$100 per acre on all locations north of the river. Subsequent to the take, I reduced them in market value in different amounts, Judge, that is why I segregated them. In other words, they being isolated there, you will notice you have one good block of land left——

The Court: What I wanted to find out was in that block of land, that tract of land, wasn't that just as isolated before the taking as it was after the taking?

Mr. Schiltz: Shall I flip the map so you can see?

A. Yes; it was just as isolated.

The Court: Did you then attribute a value to it before, but you didn't after, is that right?

A. No, sir; that is not right. I attributed value to it [374] before and after. However, I did reduce

(Testimony of W. J. Carrothers.)

it more in market value after than I did before because your whole unit is decreased in market value. I decreased it all, but decreased that a little more.

The Court: Very well. I understood you didn't give it any value afterwards. I understood that was what your testimony was?

A. I did give it value.

The Court: You gave it less value after than before?

A. Maybe this will clarify it, Judge. I gave that portion \$75, the farthest west, the tillable land farthest west \$75 afterwards, and I gave the other \$85, the other tillable land, afterwards.

The Court: How much value did you give that before?

A. A hundred dollars per acre in both instances.

The Court: As I understood it, your reason was because it was isolated. What I want to know is, wasn't it just as isolated before the taking as it was after the taking?

A. You are quite right, but it was part of a larger unit, and as such it would be a little bit more desirable, in my opinion.

The Court: Very well; proceed.

Q. (By Mr. Schiltz): Then, directing your attention to the Alta Kolstad lands——

The Court: Pardon me, before you get started on that, it is [375] time for a short recess. Court will stand in recess until half past four.

(Jury admonished.)

(Testimony of W. J. Carrothers.)

(10-minute recess.)

The Court: You may proceed.

Q. (By Mr. Schiltz): At the recess, Mr. Carrothers, we were just beginning to talk now about the lands belonging to Alta Kolstad. Are you familiar with those lands? A. Yes; I am.

Q. How did you go about appraising those lands, did you follow a similar pattern to the Clarence Kolstad lands?

A. A similar pattern, but my classification pertained only to this portion where before it had encompassed the whole ownership.

Q. Again, you had all the basic information on which to form an opinion? A. That's right.

Q. Now, did you break these lands down into a highest and best use category?

A. Yes; followed the same pattern as the other.

Q. How many acres did Alta Kolstad have before the taking on May 24, 1955, before the taking?

A. 4,699.47.

Q. And how many of those acres were cultivated? A. 1,666.59.

Q. How many were tillable? [376]

A. 1,109.2.

Q. And how many were alfalfa land?

A. 12.

Q. 12? A. Yes, sir.

Q. And how many were bottom lands?

A. 45 acres.

Q. And how many of upland grazing?

(Testimony of W. J. Carrothers.)

A. 1,867.08.

Q. After the taking on May 24, 1955, how many acres were left to Alta Kolstad? A. 2,868.58.

Q. Now, before the taking—you are familiar with this map, Defendants' Exhibit 7?

A. Yes; I have studied it.

Q. Do the outlines and classifications appearing on that map agree substantially with the classifications you have just given for the Alta Kolstad land before the taking? A. Yes; they do.

Q. Then, I remove the first overlay to the outlines and classifications shown on the remaining area. Do they agree substantially with your own areas?

A. Yes; they are substantially the same.

Q. How many acres did you say Alta had after the taking? A. 2,868.58. [377]

Q. How did they break down into use?

A. Well, the same general classifications. However, for the purpose of arriving at market value, I have changed the categories in value. For instance, that portion lying south of Willow Creek there and a portion lying north, I have carried as separate areas.

Q. When you say south of Willow Creek, you mean this area right here (indicating)?

A. Yes, sir; that has 232.9 acres of wheat and 106.74 acres of tillable land.

Mr. Galles: Repeat that, please. I missed that.

A. 232.9 acres of wheat land, and 106.74 acres of tillable.

(Testimony of W. J. Carrothers.)

Q. Referring to the north unit, how does that break down by use classification?

A. 802.7 acres of wheat land.

Q. How many acres of tillable?

A. 843.26.

Q. Did you have more to that answer?

A. Grazing.

Q. How many acres of grazing did you have?

A. 882.99.

Q. Were they all in the north unit?

A. No; there was some in the south. However, I did not make a different category out of the grazing lands.

Q. Based upon the matters and facts to which you have [378] testified, including the description of the land, your classification of highest and best use, productivity and size, do you have an opinion of the fair market value of the Alta Kolstad lands as of before the taking, the date of May 24, 1955?

A. Yes, sir.

Q. What is that opinion? A. \$329,500.

Q. Similarly, do you have an opinion of the value of Mrs. Kolstad's lands, Alta Kolstad's lands after the taking on May 24, 1955?

A. Yes, sir.

Q. What is that opinion? A. \$202,500.

Q. And computing the difference between the two, it is \$127,000? A. Yes, sir.

Q. That represents your opinion of the damage in the taking? A. Yes, sir; that is correct.

Q. Now, then, as part of your opinion, did the

(Testimony of W. J. Carrothers.)

fact that some of these lands were isolated enter into your opinion of fair market value after the taking?

A. Yes; as I have stated, I made two categories of wheat land, those lying north and those south of Willow Creek, and with only 232 acres isolated south of the creek, it makes that much less desirable segregated from the balance of the [379] unit by that body of water. Therefore, I——

Q. It can't properly be called part of a unit anymore, then, is that your point?

A. Practically speaking no. In ownership it still is, but operationally, it is not a part of the unit.

Q. In this here, did you assign the same unit values as you did in the Clarence Kolstad land?

A. Yes.

Q. Now, then, directing your attention, Mr. Carrothers, to the joint lands of Clarence and Alta Kolstad——

A. Yes.

Q. Did you inspect and examine and study those lands along with the other lands?

A. Yes; I did.

Q. You are familiar with the lands shown on this map, and recognize them as your joint property?

A. Yes.

Q. Have you appraised these lands for their fair market value both before and after the taking for Mr. and Mrs. Kolstad?

A. Yes, sir.

Q. I presume—well, I won't presume. Did you go about this appraisal in the same fashion as you

(Testimony of W. J. Carrothers.)

went about the appraisals for Mr. and Mrs. Kolstad in their individual lands?

A. Yes; I used the same process. [380]

Q. Again you had the same basic information from previous contact with the land? A. Yes.

Q. How many acres did you find that Mr. and Mrs. Kolstad owned jointly before the taking on May 24, 1955? A. 7,422.84 acres.

Q. And how were those lands classified as to use before taking?

A. My classification was 1,560.48 acres of wheat land; 1,650.6 acres of tillable land; 1,656.97 of bottom land; 201.50 acres of alfalfa; 2,353.29 acres of dry grazing.

Q. Do those classifications agree substantially with the classifications shown on Defendants' Exhibit 10? A. Yes; substantially they do.

Q. Now, then, how many acres were left to Mr. and Mrs. Kolstad after the taking on May 24, 1953?

A. 2,903.3 acres.

Q. Tell us how those broke down by classification of use?

A. 186.4 acres of wheat land lying—let me have the other map—lying northerly of the river, and 1,006.48 southerly of the Marias River.

Q. Of what class, wheat? A. Yes.

Q. All right.

A. 1,332 acres of tillable land, mostly lying northerly of [381] the river, and there is some south. I have not broken those down into different

(Testimony of W. J. Carrothers.)

categories; and 1,380.26 acres of grazing land both north and south, making 3,903.3.

Q. Now, then, based upon the matters and facts to which you have testified, including the description of the lands, your classification of the highest and best use, productivity of the lands, and the size of the units, do you have an opinion of the fair market value of the joint lands of Clarence and Alta Kolstad before the take on May 24, 1955?

A. Yes, sir.

Q. What is that opinion? A. \$457,500.

Q. Do you likewise have an opinion of the fair market value of the lands of Mr. and Mrs. Kolstad after the take on May 24, 1955? A. Yes, sir.

Q. What is that opinion? A. \$271,000.

Q. And subtracting one from the other, the difference is? A. \$186,500.

Q. And that is your opinion of the damage in the taking, by reason of the taking?

A. Yes, sir; that is my opinion.

Q. In your opinion as to these joint lands here, did you take into consideration the fact that the lands are left in [382] two separate and distinct units?

A. Yes, but except for isolating small areas of land, wheat land, north of the river from the main portion, I think there is little effect on the wheat land. The pasture lands, I think—that is the grazing lands—I think they are greatly depreciated in value because of reduced utility. They lack water supply, and all of the bottom lands and the fall and

(Testimony of W. J. Carrothers.)

winter pasture and the winter range have all been taken, leaving only the upland grazing, which destroys, completely destroys the balance of the stock operation. In my estimation, it hasn't much value left as grazing lands.

Q. Did you form an opinion as to the unit value of the various classifications of land?

A. They didn't vary from the others.

Q. Well, now, before we close with you, tell us, how did you arrive at your unit values that you have testified to?

A. Well, as I partially explained, I studied these recent sales, and from them determined that there wasn't much of a pattern in the market as to the sales, and I inquired as to the reason for this by contacting informed sources, including operators, real estate men, county officials, and so forth, who had knowledge of the area. I found that there were no desirable places, that is, economic units on the market. The real estate people contacted had no listings, I could hear of no large properties for sale that would compare with the [383] subject properties, and I also found that, as I think I previously stated, that during the past five to six years, there had been a considerable increase in the market as evidenced by sales and the consensus of informed sources as to what was happening, which was an indication that the market had gone up. Continuing this, as I stated previously, I was engaged in other appraisals, I also contacted all of these owners, some of whom had tried to replace themselves, and

(Testimony of W. J. Carrothers.)

with them I inspected some of the places they had tried to purchase to replace themselves for the lands taken. I also contacted a great many operators and well informed farmers in the area, and got expressions of opinion as to production in the area, as to land values in the area, and it is my belief that opinion, particularly informed local opinion, is one of the very definite indications of market value.

Mr. Schiltz: You may cross-examine.

Cross-Examination

By Mr. Galles:

Q. Mr. Carrothers, this cattle operation you spoke of for which you allowed some value because of the detriment to the land as a result of the taking, what kind of cattle operation do you think could be used on lands of this type, considering it is primarily a wheat farm? [384]

A. Well——

The Court: Pardon me; are you speaking of a particular ownership here now, or just generally?

Mr. Galles: No; on any of the Kolstad properties.

A. Do you mean before or after the taking, Mr. Galles?

Q. Well, let's take it before.

A. Well, before, particularly in that portion belonging to Mr. and Mrs. Kolstad jointly, if you will note, there is a large amount of bottom land. Now, there was, prior to the taking, just westerly of the

(Testimony of W. J. Carrothers.)

Turner Bridge—I think that is in Section 14, I believe it is—there was an area there on the bottom that was an excellent wintering ground. There was brush covering and open ground there for winter feeding and for protection. It was an excellent wintering ground. Also, there were a considerable amount of bottom lands, and there was some developed hay lands.

Q. The former owner, Mr. Kolstad, didn't run any cattle on it?

A. No, but I understood your question to say what type of cattle operation would it make.

Q. Yes; he didn't run any, but you think this is the best type, as a wintering operation on the joint ownership land?

A. The bottom lands are the wintering quarters in this country.

Q. Right. [385]

A. Now, I believe you brought up the question of my difference in valuation before and after the taking of the bench lands, their dry land grazing. Without the balance of hay lands, winter grazing, shelter, late fall and winter browsing and feeding in the bottoms coupled with your early spring grazing—you have got balance there for a stock operation, and when you take that away, it is a reduction in the general value of all the lands, taking it away so you have only dry lands left. You haven't much actually left.

Q. You think this is the best piece of land for

(Testimony of W. J. Carrothers.)

a wintering cattle operation, compared to say, Alta Kolstad's?

A. Well, Alta Kolstad, I don't think is as good. Now, Clarence Kolstad's, at the mouth of Willow Creek, it can be compared as a wintering grounds, that is, the bottoms there, but those bottoms along Willow Creek are not as good for wintering, in my estimation.

Q. You say along Willow Creek they are——

A. Not as good, not, as I said before, not protected quite as much in most cases, although there are some deep draws there.

Q. What about a summer operation for the Alta Kolstad property?

A. There are a great deal of summer pasture facilities in the three operations.

Q. To have a summer operation, they would have to fence off [386] the summer wheat crop, so that would be eliminated from the summer operation?

A. That's right.

Q. The sales you considered, were they all after the date of taking, Mr. Carrothers?

A. The sales I considered were from 1952 to the last sale in 1956 of which I had knowledge.

Q. You said that you considered the recent sales as being the best indications, I think?

A. Well, those are all recent sales, Mr. Galles, in my interpretation. However, as we progress in time in a rising market, I feel some of the later sales, particularly around 1955, more closely approximate the market in May of 1955, and also, as

(Testimony of W. J. Carrothers.)

I believe I previously have stated, the market, or expressions of value that I could find from various sources seemed to stabilize at this later date, not around 1952 and 1953, that is correct, although I considered those sales. I considered all the sales of which I had knowledge.

Q. Do I understand that on the date of taking, you think the market had stabilized?

A. It was beginning to, indicating values were beginning to jell, if I could put it that way.

Mr. Galles: I think that is all.

Mr. Schiltz: No other questions.

The Court: Say, I wonder if you would display Exhibit 10? [387]

Mr. Schiltz: Yes; is that the joint property?

The Court: I think it is the first one on the board. Just take the other two off. Mr. Carrothers, what is the land marked in yellow?

A. That is—on that map, that is plowed land, I mean newly broken land, which I have thrown into the cultivated category. I didn't break it down that fine.

The Court: Does that land remain after the taking?

A. No; that large block of yellow is the old designated Tract 11. It is all taken.

The Court: That is all taken. Very well, that is all.

(Witness excused.)

Mr. Schiltz: The defendants rest, your Honor.

(Jury admonished.)

The Court: Court will stand in recess until 10:00 o'clock tomorrow morning.

(Thereupon, a recess was taken until 10:00 o'clock a.m., the following morning, January 19, 1957, at which time the following proceedings were had.)

Mr. Galles: May it please the Court, counsel, ladies and gentlemen of the jury, at this time I will give a very brief opening statement and tell you what you may expect in the way of evidence on behalf of the United States in connection with the three parcels of land involved.

We will first put on a witness to identify the aerial photograph of each of these three parcels in order to show you the relative location of the river and breaks and give [388] you a little better idea of the terrain and how the land lies. Following that will be a witness to identify certain maps that were prepared from not only the aerial photographs, but other data gathered in the field, as well as records of the P.M.A. and A.S.C. offices and other land survey offices.

Then, we will put on experts, two of whom have lived in this area, one in Liberty County, for a great many years, and one in Toole County for a great many years. Both have been in the real estate business for a living and have known and seen land transactions up to and including, even some after, the time or date of taking in this case.

Another expert will be one that is in the employ of the Bureau of Reclamation who made a specific inspection and appraisal and has an opinion to express on the lands involved in this case; and our final expert will be Henry Murray, a Montana man living in Missoula who is in the business of land appraisals and land values. A great deal of his work is done in connection with farm lands, and he, of course, is hired by our office to make such an inspection and appraisal and express an opinion.

The other witness we expect to produce is Joe Mizner. Now, he is a fairly young fellow who has been in the farm and ranch business a long time in the area, and from the years 1947 through 1952, he operated these three places under lease, and he will tell you what the average production was of [389] grain, wheat, during the time he operated it, as well as the great amount of tillable land he broke up during the time he had it under lease, and the fact that there was only six or eight hundred acres of old land plowed out of all this acreage when he first went on the place. That will conclude our evidence—oh, Mr. Mizner will also testify that in connection with tillable land, he purchased about the date of taking some tillable land at the rate of \$40 per acre, and it was good, tillable land. He will describe it for you.

CHARLES KNELL

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. O'Connell:

Q. State your name, please?

A. Charles Knell.

Q. Where do you reside?

A. Billings, Montana.

Q. What is your occupation?

A. I am in charge of the Photographic Section or Division for the Bureau of Reclamation in the Western States. That includes, Montana, Wyoming, North Dakota, South Dakota, transmission lines in Minnesota, parts of Nebraska and—I think I have covered it. [390]

Q. How long have you been so employed?

A. I have been with the Bureau of Reclamation since August of 1946; August 19, 1946.

Q. Then, you are a photographer, is that right?

A. Yes; I am basically a photographer, yes.

Q. And what experience have you had in the field of photography?

A. Well, I have been in photography for more than 20 years. I was with—I made a study of photography from the year 1930 through 1935. I worked as an apprentice and copy boy during those years. In 1936, I was made a staff member of the staff of International News Reel, or Hearst Photos, which is the same company.

(Testimony of Charles Knell.)

Q. Going back to the first experience you spoke of, tell us who your employer was?

A. The period prior to being employed in 1936?

Q. Starting from the beginning, who were your employers?

A. Through the years from 1932 to 1936, I worked while I was in school for the Washington Times Herald, and for a newspaper called the Washington Sun, which is non-existent at the moment. That is where I worked those four years. In 1936, I was employed as a staff member for the International Photo or Hearst News Reel, whichever name you care to apply to it. In 1949, I was transferred to the regular White House desk of International News Photos—pardon me, I said [391] 1949, I didn't mean 1949, I mean 1938, 1939, in the fall and summer of 1938 and 1939, I was moved to the White House, and stayed there until August of—July—one minute, please—1942, October, 1942; October 10, 1942, and on October 10, 1942, I entered the Marine Corps and took basic training at Paris Island, South Carolina, and I was sent from there to the Marine Schools and served as an instructor in the United States Marine Corps until the end of the war. At the end of the war, I returned to my—I wish to go back just a minute, if I may.

Q. Very well.

A. In 1942—that is not 1942—from 1942, from October, 1941, until 1942, I had entered the United States Department of Agriculture, and had worked for the Agricultural Research Administration doing

(Testimony of Charles Knell.)

scientific and technical photography. I moved from there to the United States Marine Corps, and came back from the Marine Corps and went to work for the Department of Agriculture again in my old job. In August, 1946, the Bureau of Reclamation asked me if I would be interested in coming into the Bureau of Reclamation and coming into the Western States with headquarters at Billings, Montana. Having been here once and liking Montana, I came back here in that capacity as head of the Photographic Section for the Bureau of Reclamation in these states that I have mentioned. [392]

Q. Have you done any aerial photography?

A. Considerable, particularly since I have been with the Bureau of Reclamation, and I had considerable experience before in aerial photography. I had made many on assignment, assigned to the Army and Coast Guard to make aerials on assignment from International News Service.

Q. Do you fly yourself?

A. I am a pilot, yes.

Q. When you are taking a picture, do you fly?

A. No; we have a full-time pilot that operates the Bureau's aircraft. I only maintain control of the camera during the flight.

Q. You are in the plane, is that right?

A. Yes.

Q. And have you taken any pictures of just land, aerial photographs, for the Bureau?

A. Yes; considerable photographs. We have constructed about 3,000 miles of transmission line all

(Testimony of Charles Knell.)

through the western states from photographs I have made. They are the basis for the construction work. That is a preliminary step in building transmission lines. We do all of their location from photographs.

Q. Did you ever photograph any lands known as the Clarence Kolstad ranch?

A. I did. I photographed both from the air, and I have been [393] on the property on the ground.

Q. Did you take any photographs on the ground?

A. I did.

Q. I am going to show you an object which has been marked for the purposes of identification as Plaintiff's Proposed Exhibit No. 21. Can you identify that?

A. Yes; it is the aerial picture that I made.

Q. When did you make these?

A. I made them in 1953; November 4th.

Q. And I notice that there seems to be a number of different pictures sort of stapled together here. Explain that.

A. Well, in aerial photography, you make consecutive pictures, and the centers of those pictures have been taken out of the negatives and put down here to where the matching points meet, and by transferring the principal points, I have maintained control to lay what would be termed a mosaic of the Knutson property, with this exception: I have made one deviation from that in order to put it on this board. From this range line here to this property (indicating) is two miles. You see, I have moved that in just to get it into the exhibit. Otherwise,

(Testimony of Charles Knell.)

it would mean running 12 inches or more out to the side.

Q. You are indicating a small insert in the side portion, is that right? [394]

A. That's right, set to the west of the range line here (indicating).

Q. Now, from what elevation would you take a picture like this?

A. This particular picture is what—you are speaking of this particular picture?

Q. Yes.

A. These photographs were made at 5,000 feet above average ground level of 3,100 feet, 5,000 feet above the ground.

Q. You made all of these personally?

A. I made every picture personally.

Q. Who matched them together?

A. I supervised it, and did most of it. I had some assistance, but I was there every minute it was being done.

Q. Did you check the work after it was finished?

A. I checked the work and the original negatives, and checked the photographs for compliance with General Land Office maps. That is what most maps are made from where they exist.

Q. Is this a fair and accurate representation of what it purports to portray, the Clarence Knutson property?

A. I feel this is a fair and accurate representation of the Kolstad property. In other words, by that I mean if you went up in an airplane and you

(Testimony of Charles Knell.)

looked through the bottom or the floor from the airplane down at the property as you went [395] over it, this is exactly what you would see. There has been nothing removed, taken away or put to it whatsoever. It is an accurate representation of the property.

Mr. O'Connell: Your Honor, plaintiff offers in evidence Exhibit No. 21, and opposing counsel has indicated there is no objection.

The Court: Very well, admitted without objection.

(Plaintiff's Exhibit 21, being the aerial photograph above referred to, was here received in evidence.)

Q. Now, Mr. Knell, I hand you an object marked as Plaintiff's Exhibit 22 for the purposes of identification. Will you please identify it?

A. Well, this is from the same general survey that those photographs were. This is another section of it, and it is parcel 10-A, the Alta Kolstad property.

Q. Is it a fair and accurate representation?

A. It is a fair and accurate representation of what you would see looking down to the ground.

Q. I notice black lines put in all the photographs. Who put those in?

A. They were put in by a draftsman where I had indicated they should go by the use of pencil lines. I am not a draftsman, and the lines were drawn by a Bureau draftsman. I put pencil lines on to mark

(Testimony of Charles Knell.)

the section lines and indicated where they should appear on the photographs, and I checked [396] those against the General Land Office maps.

Q. You are satisfied that the black lines are in the right places?

A. Yes; the dotted line, too.

Mr. O'Connell: Your Honor, plaintiff offers in evidence Exhibit No. 22.

The Court: Any objection?

Mr. Schiltz: None, your Honor.

The Court: It is admitted.

(Plaintiff's Exhibit No. 22, being the aerial photograph last above referred to, was here received in evidence.)

Q. I now show you an object marked Plaintiff's Exhibit No. 23 for the purpose of identification. Will you identify it?

A. It is part of the same general survey that the other two sections were taken from. It is the joint ownership of Clarence A. and Alta Kolstad, Parcel No. 10-C. The lines were put on in the same way, and control maintained in the same fashion.

Q. You took these pictures?

A. I took each and every picture on there.

Q. Would you say this is a fair and accurate representation of what it purports to portray?

A. It is a fair and accurate representation of the property it is supposed to portray.

Mr. O'Connell: Plaintiff offers in evidence [397] Plaintiff's Exhibit 23.

The Court: Any objection?

Mr. Wiggenhorn: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit No. 23, being the aerial photograph last above referred to, was here received in evidence.)

Mr. Galles: You may cross-examine.

Mr. Wiggenhorn: No cross-examination.

(Witness excused.)

ROGER THUESEN

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Court: Mr. Galles, I see we are going to have some more maps. Are they different than the maps we do have, or are we——

Mr. Galles: They are in different form. They don't have the overlay, and we think it will give some assistance to the jury to have these maps.

The Court: Why, particularly? I mean, if we have a map that you can use—can your witnesses use the maps that are already in?

Mr. Galles: Except, your Honor, that our experts have used this information on these maps, or these maps are prepared from the information that our experts used in [398] arriving at their opinions.

The Court: Do these maps show anything different than the other maps as to the kinds of land or anything of that nature?

(Testimony of Roger Thuesen.)

Mr. Galles: This one map, for instance, shows new crop land as a distinct color. Then the other classifications are grazing and crop land.

The Court: Well, very well.

Direct Examination

By Mr. Galles:

Q. State your name, please.

A. Roger Thuesen.

Q. Where do you live and what do you do?

A. Billings, Montana; employed by the Bureau of Reclamation.

Q. In what capacity?

A. At the present time, I am head of the Appraisal Section, at the present time.

Q. I will show you what has been marked as Plaintiff's Exhibit 24, and ask you if you can identify it, please?

A. Yes; that is a map that was prepared under my supervision showing the Clarence A. Kolstad land which we call Parcel No. 10-B. It was prepared by information gathered in the field, by visual inspection on the ground, and by actual surveys for locating new crop land.

Q. Were the aerial photographs that have been received in [399] evidence used in the preparation of this map?

A. They were used to a certain extent for the background, then there was an inspection made of the fields in the area to make sure they were the same fields and to see that nothing had been changed.

(Testimony of Roger Thuesen.)

Q. Is this exhibit accurate as far as the land descriptions go and the classifications as supplied to you by these various forms of information?

A. I would say so, yes.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit 24.

Mr. Wiggenhorn: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 24, being the map last above referred to, was here received in evidence.)

Q. I show you Plaintiff's Exhibit 25 and ask you to identify this exhibit, please?

A. This is a map prepared basically the same way of what is known as the Alta Kolstad land, Parcel 10-A. This map was prepared by information gathered in the field, by the use of the aerial photographs, by some actual photographs made, and visual inspection on the ground.

Q. In the same manner as the previous exhibit?

A. Yes.

Q. Is it accurate? [400]

A. I would say so.

Mr. Galles: The government offers Plaintiff's Proposed Exhibit 25.

Mr. Wiggenhorn: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 25, being the map last above referred to, was here received in evidence.)

(Testimony of Roger Thuesen.)

Q. I show you what has been marked as Plaintiff's Proposed Exhibit 26, and ask you to identify it, please?

A. This is another map. This covers the property owned jointly by Clarence and Alta A. Kolstad. Again it was prepared basically in the same manner.

Q. Would you say it is accurate?

A. Yes; I would.

Mr. Galles: The government offers in evidence Exhibit 26.

Mr. Wiggenhorn: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 26, being the map last above referred to, was here received in evidence.)

Mr. Galles: That is all.

Cross-Examination

By Mr. Wiggenhorn:

Q. Mr. Thuesen, you have shown in your legend here certain [401] classifications of crop land, new crop land and grazing land, have you not?

A. Yes; that is the three basic classifications shown on the map.

Q. Those are the only classifications shown there, are they not?

A. That is the only classification shown, except that there is lettered in there in small letters where

(Testimony of Roger Thuesen.)

the bottom grazing is and where the upland grazing is. It is not distinguished by colors.

Q. That pertains to all three of the maps you have identified?

A. Yes; they were made by the same method.

Q. When was the data obtained for this classification?

A. Beginning in 1953, up until the date of taking, and it has been followed through since the date of taking.

Q. And that was done by the Bureau of Reclamation, yourself and other men working with you in conjunction with you?

A. That is correct.

Mr. Wiggenhorn: No further cross.

(Witness excused.)

The Court: Call the next witness. [402]

GEORGE H. GAU

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. State your name and where you live?

A. My name is George H. Gau. I live at Kalispell, Montana.

Q. How long have you lived in Kalispell?

A. Since 1953.

Q. Where did you live before that?

A. Chester, Montana.

(Testimony of George H. Gau.)

Q. How long did you live there?

A. I came to Liberty County. I homesteaded there in 1912. I lived in Liberty County from 1912 to 1953, outside of the time when I was in the First World War, which is about 16 months.

Q. What did you do during the time you were in Liberty County?

A. For 30 years I was Clerk of the District Court. When the County was organized in 1919, I was the first Clerk of the District Court. I resigned in 1949.

Q. That is an elective office?

A. That's right.

Q. You were elected continuously during the time you held the office? [403]

A. That's right.

Q. Did you have any other occupation or avocation?

A. I was in the insurance business, and in the early years, I represented different banks that are now functioning in Havre, Montana.

Q. When you say you represented banks, did that have anything to do with real estate?

A. No; that was mostly loans.

Q. Loans on lands?

A. Loans on livestock, mostly, farm machinery.

Q. Did you hold any other office while you were in Chester or Liberty County?

A. I was Mayor of the town of Chester for 14 years.

Q. Now, did you make an inspection and ap-

(Testimony of George H. Gau.)

praisal of the Kolstad properties involved in this action? A. Yes, sir; I did.

Q. When did you first go on the property for that purpose?

A. I was called to Great Falls on St. Patrick's Day, March 17, 1954, and was hired and was told to go back to Chester and set up sleeping quarters for the other two men that were hired at the same time I was. I was in charge. I did, and in a few days, why, we all came on the job, and our first line of work—especially when I was there three or four days——

The Court: Mr. O'Connell, there is too much noise going on, counsel can't hear, it distracts him. I think you had better [404] leave the exhibits go for awhile.

A. We went to the Assessor's office, and from the Assessor's office over to the Allotment Office in Chester; then likewise, we done the same thing at Shelby to get the true ownership of the Kolstad property, and also the allotment which was then in effect, and in due time, why a government car was furnished to the three of us.

Q. Let me interrupt here to ask who the other two men were?

A. Mr. McHale from Shelby and Ralph Koefod from Havre.

Q. Then what did you do?

A. We proceeded—well, I think in the first week, I drove out to Clarence Kolstad's homestead there, and he gave us his allotment papers and we went

(Testimony of George H. Gau.)

back and checked those and checked with the acres that we figured that he had at that time that were tillable. Then we made a number of different trips out on different farms and practically checked every 40-acre tract in the place.

Q. That was the three of you together?

A. Three of us together. We had our maps with us, and we had our plats, checking on the ownership, and we made a detailed report on practically every 40 acres.

Q. When did you say this was?

A. That was the latter part of March, April and May.

The Court: Of what year?

A. 1954. [405]

Q. So it extended over quite a number of weeks that you were on and off the property?

A. Yes; we would be sometimes two weeks at a time there. We would quit a few days, we would have other business to take care of, we would get a recess, and we would appear again and go back and recheck again.

Q. And during March, April and May, you were inspecting other lands as well?

A. Yes; it wasn't just the Kolstad land.

Q. Now, in addition to your checking the county records and inspecting the property, did you do anything else, Mr. Gau?

A. Oh, we talked between ourselves as to the values of land and tried to get an idea, and Mr. Koefud is in the real estate business and a big land-

(Testimony of George H. Gau.)

owner in Hill County. I, myself, own land in Liberty County, and I look after another 14 or 15 farms in Liberty County. Mr. McHale is from Toole County and is in the insurance and real estate business. He has been selling lands over a number of years; Koefud has, and so have I.

Q. You say you look after land in Liberty County. What do you mean by that?

A. I act as agent for absentee landlords that don't live in the State of Montana. Some places I have looked after for 20 or 25 years. It starts from the country straight north of Joplin and works down to the Marias straight south of Joplin; [406] then I have lands south and north of Chester, north of Lothair, they are scattered all over through the county.

Q. As agent, does that mean you supervise the operation of farms and collect the crop—was it rented on a crop share?

A. A one-quarter crop share basis.

Q. Is that the usual basis in that area, one-quarter?

A. We have some we get one-quarter up to 20 bushels; over 20 bushels, now we get one-third. Years back it was one-fifth.

Q. It is changed to one-quarter and then a modification of the one-quarter rental basis?

A. That's right.

Q. Did you consider any sales of property in the vicinity of this land in either Toole or Liberty Counties?

(Testimony of George H. Gau.)

A. I have known of a lot of sales for the last 10 years in Liberty County. At that time we considered sales, yes, sales that had been made prior, and were being made, you know.

Q. You made this inspection and done all the things you said to this point before the date of taking. Have you done anything since the date of taking that would have an effect upon your opinion?

A. I have checked sales and listened to sales and have been told about different sales since the date of taking.

Q. You have taken those matters into consideration up to the present time—— [407]

A. That's right.

Q. ——in arriving at your opinion?

A. Yes.

Q. I will ask you if you have an opinion of the fair market value of the Clarence A. Kolstad property before the taking, that is, the whole ownership by Clarence Kolstad before the taking?

A. Yes; I have.

Q. I will hand you Exhibit No. 27, and ask you if you can identify that, Mr. Gau?

A. That is a copy of my original.

Q. Original what?

A. Original value as I have set it up on this property here, the Clarence A. Kolstad property.

Q. This is a summation of the opinion that you have as to the value of the Clarence A. Kolstad property?

A. That's right.

Q. That is, insofar as the first page is concerned.

(Testimony of George H. Gau.)

The other pages relate to the other two parcels involved in this action, is that correct?

A. This is known to me as the Wasesha place. That is the former owner. This is the Alta Kolstad place.

Q. Now, you have referred to the Wasesha place as the first page? A. Yes. [408]

Q. The second page is known to you as the Alta Kolstad place?

A. That's right, and this is the land of C. A. Kolstad and Alta Kolstad, jointly.

Q. You have referred to the last page?

A. Yes.

Q. Would you state what your opinion is of the fair market value of the Clarence Kolstad property, of his entire ownership before the taking?

A. Do you want the number of acres?

Q. No; the total value. A. \$277,592.62.

Q. And how did you arrive at that value, Mr. Gau?

A. That is on the breakdown of the different holdings or the different acres in this holding, that is how I arrived at it.

Q. You mean by classification, by land classification? A. That's right.

Q. What classifications, and how many acres of each did you find?

A. I classified with the other two the land that can be irrigated, about 60 acres.

Q. What other classifications?

A. Crop land, 2,081.5; new crop land, 495 acres;

(Testimony of George H. Gau.)

bottom land, 1,061 acres, and potential crop land, 580 acres; grazing, 921.21 acres, a total of 5,198.70 [409] acres.

Q. Now, what per acre value did you assign to each of those classifications, and what was the total amount that you have extended?

A. The 60 acres of irrigable, I placed a value on that of \$125, or a total of \$7,500; the crop land, a total of 2,081.5 at \$85, a total of \$176,927.50; the new crop land of 495 acres, a total of \$50, \$24,750; bottom land, a total of 1,061 acres at \$40 an acre, \$42,400; and potential crop land, 580 acres, \$25 an acre, \$14,500; and grazing, 921.21, at \$12.50, \$11,515.12, a total of \$277,592.62.

Q. Were there any improvements on the Clarence Kolstad place?

A. We didn't give him any improvements because the buildings were in pretty bad shape for repairs.

Q. There were some buildings and structures on it but you gave them no value?

A. No value.

Q. Do you have an opinion as to the fair market value of the land remaining to Clarence Kolstad after the date of taking as of May 24, 1955?

A. Remaining, we have that set up at \$78,694.

Q. And how did you arrive at that, Mr. Gau?

A. Crop land, 806.5, \$85 per acre, \$68,532.50; potential crop land, 300 acres at \$25, \$7,500; and there is remaining 293.5 acres of grazing at \$9,

(Testimony of George H. Gau.)

\$2,641.50, a total of 1,400 acres [410] remaining at a price of \$78,694.

Q. I notice your per acre values remain the same in the remaining unit as you assigned to the whole unit except for the grazing land, which was \$12.50 and now you have assigned \$9.00 an acre. Would you explain that, the reason why you reduced your value of the grazing land after taking?

A. In the whole unit, we had it at \$12.50 and in the remaining at \$9.00. We were giving them that for severance, the \$3.50 per acre, because it has not much value as a tie-in for the other land.

Q. You think each acre was reduced \$3.50 an acre because of the taking? A. That's right.

Q. Subtracting the remaining value from the before value, what figure do you get?

A. I have \$198,898.62.

Q. Now, do you have an opinion as to the fair-market value of the Alta Kolstad property as of May 24, 1955, before the taking, that is, her entire ownership before taking?

A. Yes, sir; I have.

Q. Would you state what that opinion is?

A. As to the amount now again?

Q. Yes; the total amount.

A. That is \$188,519.62, along with improvements of \$3,550, which makes a total of \$192,069.62. [411]

Q. How did you arrive at that?

A. There is crop land, 1,140.5 acres at \$85 an acre, a total of \$97,707.50; upland tillable, 300 acres at \$25, \$7,500; grazing, 1,379.9, at \$9 an acre is \$12.-

(Testimony of George H. Gau.)

411.81, or a total of 2,828.59 acres, and a total of \$117,619.31.

Q. And what is the difference between the remaining value and the before value?

A. \$75,450.31.

Q. Now, do you have an opinion as to the fair market value of the joint ownership of C. A. and Alta Kolstad, as of May 24, 1955, before the taking, that is, their total ownership?

A. That is as to the value now?

Q. Yes; including improvements, if you have improvements included.

A. The total value is \$251,482.62, with improvements of \$6,100, or a total of \$257,582.62.

Q. How did you arrive at that, Mr. Gau?

A. Well, we have irrigable land, 156.5 acres at \$125 an acre, a total of \$19,562.50; crop land, 1,215 acres at \$85 an acre, or a total of \$103,275; new crop land, 305 acres at a value of \$50 an acre, a total of \$15,250; bottom land, 1,052 acres at \$40 an acre, \$42,080; and potential tillable, 960 acres at \$25 an acre, \$24,000; grazing, 3,785.21 acres at \$12.50, or a total of \$47,315.12. [412]

Q. That totals \$257,582.62?

A. That's right.

Q. Now, if you have an opinion of fair market value as of the same date of the land remaining to Mr. and Mrs. Kolstad jointly, state what that total is? A. \$126,092.85.

Q. How did you arrive at that?

A. There is remaining in that unit crop land,

(Testimony of George H. Gau.)

1,100 acres at \$85 an acre, \$93,500; upland tillable, 460 at \$25 an acre, \$11,500; and grazing, 2,343.65 acres at \$9 an acre, \$21,092.85.

Q. And the difference between your opinion of the value of the remaining from the value of the whole unit is what? A. \$131,489.77.

Mr. Galles: You may examine.

Cross-Examination

By Mr. Wiggenghorn:

Q. When did you say, Mr. Gau, that you made this appraisal? I am speaking about these figures you have extended here in your Exhibit 27?

A. When did we make them?

Q. Yes; when were they calculated and set down?

A. These figures here?

Q. Yes, sir. [413]

A. These were set down in the last week after we got the new—there was some new crop land that was put into these here different tracts that weren't in there before.

Q. That is to say, you and Mr. McHale and Mr. Koefud?

A. No, these figures were done by myself.

Q. The three of you got together, or did you do it yourself?

A. These are my separate figures. Mr. Koefud, if he has any, I don't know, and I don't know what figures Mr. McHale has.

Q. Now, looking at those figures, they are a bit

(Testimony of George H. Gau.)

confusing, of course, as are all numbers, but this much is true, it is quite apparent through all of your three respective sets of results, is it not, Mr. Gau, that for the crop land, you have put down a uniform value of \$85 an acre, both before and after the taking, right? A. That's right.

Q. If you don't speak up and just nod your head, the reporter won't get it. By crop land, do I understand you are referring now to, and you are cataloging that as the land that is wheat land?

A. That's right.

Q. As distinguished from what you have called irrigable land here? A. That's right.

Q. So that I take it, whether or not you agree with the [414] total acres of the witnesses for the defendants in this case, you are referring to the same kind of land when you call this crop land as they have called plowed ground or cultivated ground, is that right? A. That's right.

Q. We just have a third name for it now?

A. Yes.

Q. And I notice also, and I want you to tell me whether or not it is not so, that uniformly in each one of these appraisals for these three places, you have not reduced the value in your appraisal for the remaining units left under what you had valued it before the taking? A. No.

Q. You have not? A. No.

Q. You still adhere to the \$85 value?

A. Yes.

Q. And the same holds true, does it not,

(Testimony of George H. Gau.)

throughout all of these valuations as you give them here in your exhibit 27 pertaining to all three places as to each one of the other categories as you have broken them down here, irrigable, new crop land, bottom land, potential crop land, and all of them except grazing? That is the only one where you made any reduction at all after the taking, is that true? A. Yes. [415]

Q. In that case, your reduction was in fact \$3.50 per acre? A. That's right.

Q. So whereas you start out with a uniform price on all of these places of \$12.50 per acre for the grazing, you made a uniform cut by a uniform scale and after the taking, you value the grazing land remaining at \$9? A. That's right.

Q. You do recognize, do you not, Mr. Gau, that before this taking there was abundant water both from the Marias River and from Willow Creek available for stock on the grazing land? A. I do.

Q. And what have you to say as to whether that water was available after the take as you saw the land?

A. I think there will be plenty of water after the taking with all the water they will have down there.

Q. Do you understand that the livestock on the grazing land after the taking would have access to this reservoir, or what remained of the river and creek?

A. I think where there is water, if you have cattle, they will eventually go to water.

(Testimony of George H. Gau.)

Q. Even though they go on Fish and Game Commission land? A. I do for a fact.

Q. You have assumed then that the cattle would be able to [416] travel to water and there wouldn't be any fence to stop them, a dividing line between the lands remaining—I don't know if this map will show it very well, but I understand these heavy lines bound the lands taken upon this particular exhibit that you see in front of you. At any rate—neither is the lake shown on this exhibit, so it isn't a very good illustration, but you have seen exhibits that show the lake, have you not?

A. Yes.

Q. You do recognize, do you not, and you knew it to be a fact, did you not, that beyond the actual borders of the high water mark of that lake or reservoir, there was additional land that was taken so that assuming there was a fence along the boundary line of the lands after the taking, there was no way the cattle could reach the reservoir, isn't that true?

A. Yes.

Q. But nevertheless, you still thought the cattle could somehow get to water, and therefore, you didn't reduce your value more than \$3.50 for the grazing land after the taking, is that correct?

A. That's right.

Q. Now, this new crop land that you have listed here, by that, I suppose——

A. That is that new breaking. [417]

Q. You heard the testimony of Clarence Kolstad? A. Yes.

(Testimony of George H. Gau.)

Q. That is what he explained to us had been broken only a few years ago?

A. That's right.

Q. It was broken, however, before the date of taking, wasn't it? I think as he testified here, unless you disagree with him, that land had been broken a year or two before, had one year of summer fallow on it, but hadn't yet raised a crop?

A. Some of it has and some of it was broken later.

Q. After the taking?

A. We were there in the fall of 1955, and he was breaking some then.

Q. Well, I am just interested in what you have gathered together here as new crop land. I assume you are putting down values as of the date of taking, May 24, 1955?

A. That's right.

Q. We are not interested in what happened since that time, are we?

A. It is practically all on our first trip, and later in 1955, there was a lot of land broken.

Q. Your first trip was in March, 1954?

A. Yes. There was a lot of that land broken from 1954 to March, 1955. [418]

Q. Notwithstanding these figures and the values you put down on Exhibit 27 were made last week, the basic information you obtained for the tabulations you have here was back in 1954, was it?

A. No, but I say 1954 was the first time we were on the land, March, 1954.

(Testimony of George H. Gau.)

Q. You might tell us again, when did you see the land again after March, 1954?

A. The last time I think I saw the land was 1955.

Q. In what month of 1955?

A. November, 1955.

Q. Well, just to make the matter clear, can you make clear to us as of what date these lands were so cataloged as new crop land, because what might be new yesterday wouldn't be new today, that is what I am talking about?

A. On what date?

Q. Yes, approximately?

A. As far as I was concerned——

Q. Well, you are the only one that is concerned, if this is your appraisal, you see.

A. Well, when this came up, they said they were changing these here because there was an understanding between all of you as far as new crop land was concerned.

Q. Who was it said that? Who said that?

A. The Bureau of Reclamation. They said they had an understanding [419] there between you with reference to the new crop land.

Q. You were employed by the Bureau of Reclamation in the first instance?

A. That's right.

Q. And you still are?

A. I am at the present time.

Q. All the work you done was done for the Bureau of Reclamation?

A. That's right.

(Testimony of George H. Gau.)

Q. You were employed for the job of making an appraisal for them, were you not?

A. Yes, sir.

Q. And the three of you collaborated and did come up with an appraisal shortly after you first made the inspection before the date of taking?

A. We made a first appraisal on that, yes.

Q. Now, at that time, as I understand it, you were instructed to make an appraisal of all three of these present units in one, were you not?

A. That's right.

Q. Did you treat them differently because you were asked to make one appraisal of the three as one unit than you have now treated them as independent three units?

A. No, I haven't made any change.

Q. You haven't made any distinction in your values in that [420] respect, your breakdown values, have you?

A. No.

Q. And you, therefore, made an appraisal at that time, and I am referring now to some time before the date of taking, May 24, 1955, and some time after March, 1954, when you first entered upon your employment, you made an appraisal of the entire three units combined, did you not?

A. Yes, sir.

Q. What was the figure you came up with at that time for your value of the lands taken, plus severance damage?

A. I don't recall now.

Q. I will remind you, wasn't it \$226,000 about?

A. I was going to say something about that, but

(Testimony of George H. Gau.)

I didn't know for sure. It was between \$225 and 230 thousand.

Q. You do know, as a matter of fact, that based upon that appraisal that you three men made, there was a deposit in this case——

Mr. Galles: I will object to that as not being proper.

The Court: The objection is sustained, and the jury is admonished to disregard any implication rising out of the question asked by counsel with reference to the deposit that was made.

Q. I understood you to say, Mr. Gau, that you took every possible thing into consideration that might bear upon values in coming to your conclusions of value? [421] A. Right.

Q. That's right. Among those things you took into consideration, I believe you mentioned, were sales in the area that you are pretty well familiar with? A. That's right.

Q. Were you and are you familiar with the sale of the parcel of land of about 1120 acres from Gilbert to Leck?

A. I have heard about that in one of the other cases. I am not familiar with it, no.

Q. You hadn't heard of it at the time?

A. No.

Q. You didn't take that sale into consideration then?

A. No, that was over in Toole County.

Q. It happens to be right adjacent to one of these places.

(Testimony of George H. Gau.)

A. It is across the line, though.

Q. Boundary line, you mean? A. Yes.

Q. It joins onto one of these three units you are appraising now?

A. It is real close, and I didn't know anything about that.

Q. You didn't know about it at the time?

A. Only when I heard about it in Court.

Q. At the time you were making the appraisal, you didn't know anything about that?

A. Oh, no. [422]

Mr. Wiggenhorn: That is all.

Mr. Galles: I neglected to offer in evidence the summation sheet of Mr. Gau, which is Plaintiff's Exhibit 27.

Mr. Wiggenhorn: No objection.

The Court: It is admitted without objection.

(Plaintiff's Exhibit 27, being the summation sheet above referred to, was here received in evidence.)

Redirect Examination

By Mr. Galles:

Q. Mr. Gau, with reference to the access to water by livestock after the taking, I understood from your cross-examination that you considered that there was access to water by livestock?

A. There will be plenty of water. I don't know if there will be access to the cattle or not.

Q. I see. Now, assuming that the cattle are prohibited from going to the water, that would make a

(Testimony of George H. Gau.)

difference in your opinion as compared to if they were permitted? A. That's right.

Q. Your opinion is based on the assumption that they are permitted to go to the water?

A. No, it isn't that they are permitted. If there is water down there and you have got cattle, if they are thirsty, they are going to seek a drink. I don't know if they are [423] permitted to go down there or not.

Q. You stated you were employed by the Bureau of Reclamation today to appear and give testimony. You are employed by the government?

A. Not by the Bureau today.

Q. You are employed by our office?

A. That's right.

Q. Your first appraisal was for the Bureau of Reclamation, and your opinion today was for and on behalf of our office? A. That's right.

Mr. Galles: That is all, thank you.

(Witness excused.)

The Court: Court will stand in recess until 15 minutes after 11.

(Jury admonished.)

(10-minute recess.)

P. R. McHALE

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Would you state your name and where you live?

A. My name is P. R. McHale. I live in Shelby, Montana.

Q. How long have you lived there, Mr. McHale?

A. I have lived in Shelby since 1919, but I have lived in [424] what is now Toole County since 1901.

Q. What do you do there?

A. I have been engaged—the last 13 years, I have been engaged in the real estate and insurance business, but I am just about to retire.

Q. And in the real estate and insurance business, you handled real estate sales?

A. I did.

Q. For both buyers and sellers of farm lands?

A. I think it was always for the seller as far as I can recall.

Q. But there were farm lands included in your business?

A. That is true.

Q. Do you own land yourself?

A. Yes, I do.

Q. Farm land? A. Yes, sir.

Q. Do you raise wheat on it?

A. Yes, sir.

Q. Do you operate the farm land yourself?

A. No, it is on crop shares.

(Testimony of P. R. McHale.)

Q. On what shares? A. One-quarter.

Q. Is that the usual fraction in your community?

A. It is except for one small area in the vicinity of [425] Sweetgrass. I think they get a third in some cases, but a quarter is general. I might say in answer to the question that this land I am interested in now is in the process of being sold.

Q. The land you own?

A. Personally or jointly.

Q. Did you have any other business in Shelby in connection with farm lands or connected with farming operations?

A. Well, I was agent for the Travelers Insurance Company there, and I have done quite a bit of appraisal work in home loans in Shelby and the surrounding areas.

Q. Before you got into the real estate and insurance business, what did you do?

A. Well, originally I was in the cattle business with my brother in the Sweetgrass Hills for about 10 years. About 1910, I homesteaded up in the Devon—Galata area.

Q. Is that close to the lands involved in this action?

A. It is in the general vicinity, I should say 10 or 12 miles.

Q. From the Kolstad properties? A. Yes.

Q. In what direction from this property?

A. South and east.

Q. You mean the Kolstad property is south and east of where you homesteaded? [426]

(Testimony of P. R. McHale.)

A. Of my holdings and what were my holdings, and I might add that my sister and I owned at one time a half section that was only a mile from the Kolstad holdings.

Q. You are familiar with the general area here?

A. I would say I am.

Q. And have been for a long time?

A. For many years.

Q. Did you ever work in the County Assessor's office?

A. I was Deputy County Assessor in Toole County for, I think, three or four years during the active season.

Q. Have you had any other experience that bears upon your qualifications to act as a land appraiser and expert in this case that you can think of that I haven't asked you about?

A. Well, at different times—I recall acting for the Twin City Land Company in appraising their holdings in Toole County, and I was on the appraisal board in 1945 that made an appraisal of these lands that are now behind the Tiber Dam, and I think that would cover it.

Q. When you say appraisals, what kind of an appraisal were you to make, what were you to determine, what kind of value?

A. To determine the just compensation for the lands to be taken in the Tiber Dam area that were to be flooded.

Q. Did that involve fair market value?

(Testimony of P. R. McHale.)

A. Yes, that is what we were supposed to arrive at.

Q. Now, you made an appraisal of these lands for the Tiber [427] Dam Project in 1945. Did you make a subsequent appraisal of the lands?

A. In 1954.

Q. That was in connection with Mr. Gau and Mr. Koefud? A. That is correct.

Q. Would you state what you did and what you took into consideration in making your appraisal in 1954?

A. Well, we, of course, checked the lands; we used the maps furnished by the Bureau; we used the A.S.C. records in Chester and in Shelby. As I recall it, Mr. Kolstad loaned us his own A.S.C. records on all these lands, and we made use of those in determining the acreages, and, of course, we went out and inspected the lands, forty by forty, as Mr. Gau testified. In addition, why, of course, I checked back on my memory of sales in the Toole County area; and where I felt I was in need of further information, I checked with some of the best informed people in that area. For instance, as to irrigated land, there isn't very much irrigated land in Toole County, so I talked to the head of the Water Users Association in Valier. They have an 80,000-acre project over there. And as to land values, I relied principally on sales in the area that were as nearly comparable to these lands as I could find.

Q. You spent about how much time on the lands?

(Testimony of P. R. McHale.)

As Mr. Gau testified, you were out there with him and Mr. Koefud at [428] all times? A. Yes.

Q. And now, do you have an opinion today as to the fair market value of the Clarence Kolstad property, the entire ownership, before the taking as of May 24, 1955? A. I have.

Q. And you are employed by our office to come here today to testify, is that correct?

A. That is correct.

Q. I have had an exhibit marked Plaintiff's Exhibit 28. I wonder if you would state what that is, generally?

A. I would say that it is a summary of the appraisal that I have made, taken from notes that I made up myself.

Q. And it consists of three pages, of which each page pertains to one of the parcels in this lawsuit, is that right? A. That is correct.

Q. And you had it prepared, and the items in it you know to be correct and represent your opinion?

A. That is correct.

Q. Now, in order to save time and so you don't have to read all of the figures on here, Mr. McHale, I will ask you if you have an opinion of the fair market value of the C. A. Kolstad property; or Clarence Kolstad property before the taking, that is, fair market value as of May 24, 1955?

A. I do. [429]

Q. Would you state what that is?

A. \$252,557.63.

Q. Now, did you—would you tell me if you had

(Testimony of P. R. McHale.)

assigned to the different classifications of land a certain per acre value? A. I did.

Q. Would you state what the classifications are, and the per acre value that you have assigned?

A. Do you want the acreages?

Q. No, I think if you would leave the acreages off and just give the per acre value for each classification.

A. For irrigable land, \$95 per acre; cultivated land, \$75 per acre; new crop land, \$60 per acre; upland tillable, \$40 per acre; river bottom, \$30 per acre; and upland grazing, \$12.50 per acre.

Q. Of course, on this exhibit, the first page, you have the number of acres of each classification you have, extending, of course, the figures so that the total value for each classification added together makes your opinion of the value of the whole?

A. That is correct.

Q. Now, do you have an opinion of the fair market value of the land remaining to Clarence Kolstad after the taking as of May 24, 1955?

A. I do. [430]

Q. Would you state what that total is?

A. \$63,623.75.

Q. And I notice there are three classifications of land left. Would you state what rate per acre you assigned to each of the classifications?

A. For the cultivated, \$65 per acre; for upland tillable land, \$30 per acre, and for the upland grazing, \$7.50 per acre.

Q. I notice you have reduced your per acre

(Testimony of P. R. McHale.)

value for each classification as compared to your before taking values? A. That is correct.

Q. Would you explain why you have done that?

A. Well, that difference would represent the severance found, in my opinion.

Q. Explain that, please?

A. Well, from the taking and dividing the other acreages up and splitting it up, I felt that the owner was entitled to be compensated for that taking and the difference in the price is the amount I felt he was entitled to.

Q. Would another way to put it be to say you felt that as a result of the taking, the remaining property had been reduced in value?

A. That is correct.

Q. What is the difference between the before and after valuations for the Clarence Kolstad property? [431] A. \$188,933.88.

Q. Now, do you have an opinion of the fair market value of the Alta Kolstad holdings, that is, the entire ownership before the taking as of May 24, 1955? A. Yes.

Q. Would you state what that is?

A. \$181,724.63.

Q. Now, you have read that from page 2 of what is marked Plaintiff's Exhibit 28, and in addition, you have, I notice, itemized the number of acres, rate per acre of the classifications, together with the extended amounts? A. That is correct.

Q. Now, the number of acres and the extended amounts, are they correct?

(Testimony of P. R. McHale.)

A. I would say yes.

Q. Now, in order to shorten it again, would you then state what the classifications are and the rate per acre you have assigned to each one?

A. For cultivated land, \$75 per acre; new crop land, \$60 per acre; for upland tillable, \$40 per acre; river bottom, \$30 per acre; upland grazing, \$12.50 per acre.

Q. Any improvements on this Alta Kolstad property? A. There were.

Q. What did they consist of, and what value did you assign?

A. Well, there was a house on the property, as I recall it, [432] a five room house. It was old but usable; and a barn, a garage, and some other out buildings, but those were the main factors in the appraisal.

Q. In your total valuation, did you include any value for those improvements?

A. I included \$3,550.

Q. Now, do you have an opinion of the fair market value as of the same date of the property remaining to Alta Kolstad after the taking?

A. I do.

Q. Would you state the classifications and the rate per acre you have assigned to each of those?

A. For the cultivated land, \$75 per acre; for upland tillable, \$40 per acre; for the upland grazing, \$7.50 per acre.

Q. I notice the per acre values you have as-

(Testimony of P. R. McHale.)

signed on the remaining lands are the same except for the grazing land. Would you state why you did not reduce the values after the taking in this case as you did in the Clarence Kolstad properties?

A. Well, in my opinion, the remaining unit of the cultivated and tillable were such that they were not damaged materially by the taking, and the grazing land was.

Q. I see, and you have reduced the value of the grazing by \$5.00 per acre as a result of the taking? [433]

A. That is correct.

Q. What is the value of the remaining lands after the taking, the total?

A. \$108,550.68.

Q. And the difference between the before and after value is what?

A. \$73,168.95.

Q. Now, turning to the joint ownership, Mr. McHale, do you have an opinion as to the fair market value of the joint ownership, the entire joint ownership as of May 24, 1955, before the taking in this case?

A. I do.

Q. State what that is?

A. \$229,180.13.

Q. And again on this third page of the exhibit you have been referring to, you have the number of acres listed on the left hand side, as well as the extended amounts at the rate per acre you have assigned, and are those figures correct as far as you are concerned?

A. As far as I know, they are correct.

Q. And would you state the classifications of the

(Testimony of P. R. McHale.)

lands as well as the per acre value you have assigned with reference to this joint property?

A. For the irrigable acreage, \$95 per acre; cultivated, \$75 per acre; river bottom, \$30 per acre, upland tillable, \$40 per [434] acre; and upland grazing, \$12.50 per acre.

Q. Now, do you have an opinion of the fair market value on the same date of the property remaining in the joint ownership after the taking?

A. I do.

Q. State what that is? A. \$102,877.38.

Q. Now, what classifications remain, and what values per acre do you feel was proper?

A. For the cultivated land, \$65 per acre; for the upland tillable, \$30 per acre; for the upland grazing, \$7.50 per acre.

Q. I notice you have reduced each of the per acre values in the remaining unit as compared to the whole unit. Would you state why you did that?

A. Well, it is severance, and the lands on the south side of the river are cut off, and in general I figured that the remaining acreage has been damaged to the extent of \$10 per acre on upland tillable, \$10 per acre on the cultivated, and \$5 on the grazing.

Q. What is the difference between the after value and the before value, please?

A. The difference is \$126,302.75.

Mr. Galles: The government offers in evidence Plaintiff's Exhibit 28. [435]

Mr. Wiggenghorn: No objection.

(Testimony of P. R. McHale.)

The Court: Admitted.

(Plaintiff's Exhibit 28, being the summary last above referred to, was here received in evidence.)

Mr. Galles: You may cross-examine.

Cross-Examination

By Mr. Wiggenhorn:

Q. Mr. McHale, directing your attention to your tabulation here with respect to the Clarence A. Kolstad place, that is No. 28, do you have it before you there?

A. No, I do not, I have my notes, however.

Mr. Galles: I will hand him a typewritten copy, if that is agreeable since the original is being passed to the jury.

Q. Reading from your classifications and your values, will you follow me? The first item there for irrigable, you have a value of \$5,700, do you?

A. That is correct.

Q. And cultivated is \$156,112.50?

A. Correct.

Q. The new crop land is \$29,700? A. Yes.

Q. Upland tillable is \$23,200? A. Correct.

Q. The river bottom is \$31,830? [436]

A. That is correct.

Q. Upland grazing is \$11,515.13, right?

A. Correct.

Q. Now, I understood you to say, correct me

(Testimony of P. R. McHale.)

if I am wrong, that your appraisal of the entire Clarence A. Kolstad farm is \$252,567.63 before the taking? A. That is correct.

Q. Well, Mr. McHale, will you get your pencil out and add those figures up and see if you didn't make an error?

A. There is something wrong there, counsel.

Q. What do you make it out to be now after you have added it again?

A. Let me just make one more check. \$258,-057.63.

Q. Yes, I agree with that. You had it \$252,-567.63?

A. That is what it says. I didn't type it, but I probably made the mistake myself.

Q. Did you do the addition yourself?

A. No—I added it.

Q. At any rate, you are ready to say now, instead of appraising this entire tract before the taking at 252 thousand, it is now 258 something, isn't that right? A. Yes, I am.

Q. Do you want to make that correction on the exhibit, or I will ask counsel if he wishes to?

Mr. Galles: I was thinking it was possible he made a [437] typographical error.

Mr. Wiggernhorn: In order to save time, how would it be if counsel and the witness got together during a recess?

The Court: The question is, is it your opinion that the before taking value is \$252,000 or \$258,000, which is your opinion?

(Testimony of P. R. McHale.)

A. May I look at my notes, please?

The Court: Well, do you have an opinion on the total?

A. It is—I will correct it to \$258,057.63.

The Court: Why have you corrected it?

A. An error in the addition **there**.

The Court: What did you do, just take these individual items and add them up and say that is it?

A. That is apparently it.

The Court: Is that the way you did it?

A. Well, that is it, listed the different items and made a total.

Q. (By Mr. Wiggenhorn): I think what his Honor is directing your attention to, Mr. McHale, is this, and I want to know it, too. When you gave us that opinion, your opinion of the value of this parcel of land before the taking, are you arriving at that opinion by this method of adding up, getting in all the cents and so on, adding up these figures tabulated here as you have classified this land?

A. Yes. [438]

Q. Is that the way you arrived at your opinion of market value? A. Yes.

Q. You didn't look at it as a whole, and after considering all the elements and facts, arrive at that figure?

A. In arriving at these different prices or classifications, why certainly I gave that consideration, as I think I have testified to, as to sales and viewing the land.

Q. I think it is almost evident, is it not, Mr.

(Testimony of P. R. McHale.)

McHale, actually when you come up with this precise figure down to 63 cents, you did really arrive at your final figure and thus your estimated opinion of value based upon the method you used here, which is adding up irrigable, cultivated, listing each of them separately and adding up the figures, and you made a mistake in your addition and arrived at \$252,000, which you now expressed as the value of the whole? A. That is correct.

Q. You are ready to change it right now as soon as you find you didn't add right?

A. I am glad to do that.

Q. Could it be possible in your exhibit, when you carried out these figures, the totals for each classification, irrigable, cultivated and so on, you in turn had to do some arithmetic. You had to take the total number of acres and multiply it by value? [439] A. That is true.

Q. I haven't had time to check those.

A. I have been an accountant for many years. I should have had it right.

Q. However, I do understand you to say that you did take into consideration other sales that were made in this vicinity and so on? A. Yes.

Q. Did you take into consideration—I will ask you do you know about the sale of Gilbert to Leck?

A. Just by hearsay.

Q. Did you take that one into consideration?

A. No.

Q. Is it also true with respect to yourself, as with respect to Mr. Gau, as he testified a few min-

(Testimony of P. R. McHale.)

utes ago, that you were employed by the Bureau of Reclamation originally, along with Mr. Gau and Mr. Koefud to do this job of appraisal for the Bureau? A. That was correct.

Q. That was in March, 1954, to start with, at least? A. Correct.

Q. At that time, the three of you arrived at an appraisal and appraised the property as of the date of taking, did you not? A. Yes. [440]

Q. And that appraisal that you and they arrived at was \$226,000 for all three units added together, wasn't it?

A. Well, I couldn't say that was the exact amount. I would say it was the approximate amount; I don't recollect; it was three years ago.

Mr. Wiggenhorn: That is all.

Redirect Examination

By Mr. Galles:

Q. Mr. McHale, looking at your notes now, just so I am satisfied, does the exhibit correctly reflect what figures you have in your notes, so I know it was no typographical error between your notes and the final draft?

A. No, the typing is correct, it is the addition.

Q. All right, now, then, since you stated that you wanted your exhibit here to reflect what your opinion is, would you make the changes on this exhibit to reflect what you believe the fair market value is and make the proper subtraction then down below as to the difference, please?

(Testimony of P. R. McHale.)

(Witness does as requested.)

Q. Have you completed that? A. I have.

Q. Would you state now then what the before value is, the after value, and the difference?

A. The before value is \$258,057.63; the value of the [441] remaining unit, \$63,623.74, and the difference, \$194,433.88.

Mr. Galles: Very well.

The Court: Now, I understand that the exhibit has now been changed, but has your opinion been changed? Is it your opinion that the before value is \$258,057.63, or is it your opinion as you first stated it, \$252,567.63?

A. My opinion is that the before taking amount is \$258,057.63.

The Court: Was that arrived at independently? Has that always been your opinion?

A. Well, since—yes, that is the opinion. It was just simply a clerical error, your Honor.

The Court: Do your notes, the notes you made, do they reflect that you fixed the before valuation of \$258,000?

A. No, the notes are wrong.

The Court: Then, your exhibit was, or your opinion was just based upon the mathematical formula of adding up what you thought the separate valuations were in this case, is that right?

A. Yes, the components.

The Court: Very well, that is all. Any further questions?

Mr. Galles: No further questions.

(Witness excused.)

The Court: It is about time for the noon recess. I think maybe—what would you think of starting, say, at 1:30 this [442] afternoon and quitting a little early? Are you in favor of that? Let's recess then until 1:30. Court will stand in recess until 1:30.

(Jury admonished.)

(Noon recess.)

Mr. Galles: Just before we recessed for lunch, your Honor, the jury had a couple of exhibits they were looking at, and I would like to get them back to them.

The Court: Very well.

JOE MEISSNER

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. Joe Meissner from Chester, Montana.

Q. Do you live in Chester?

A. I live in Liberty County 17 and a half miles out of Chester.

Q. How long have you lived there?

A. All my life.

Q. What do you do?

(Testimony of Joe Meissner.)

A. Farm and ranch.

Q. That is wheat farming? A. Yes. [443]

Q. Is that winter or spring wheat?

A. Both.

Q. And you have some livestock? A. Yes.

Q. What kind? A. Herefords.

Q. Are you acquainted with the property involved in this action belonging to Clarence Kolstad, Mrs. Kolstad and to them jointly? A. Yes.

Q. How do you know about that property?

A. Well, I and my brothers, we farmed it for six years.

Q. From what year until when?

A. 1948 until 1953.

Q. And what arrangement did you have with Mr. Kolstad?

A. We paid him 15 cents an acre for the grazing land and one-quarter of the crop share.

Q. On the cultivated or wheat lands?

A. Yes.

Q. When was the first year you took a crop off the Kolstad property? A. 1948.

Q. And do you know what the average yield was in that year?

A. Around 24 bushels on the wheat.

Q. How many acres did you have in? [444]

A. It was around 800 acres.

Q. And had that been cultivated—

Mr. Wiggenhorn: I didn't hear his answer. How many acres?

(Testimony of Joe Meissner.)

Q. About how many acres, 800, is that what you said? A. Yes.

Q. That was land that had been cultivated and farmed on the place before you went on?

A. About 600 acres had been cultivated before, and the other 200, we prepared that in the spring.

Q. In the spring of 1948? A. Yes.

Q. And took a crop off that same fall on the new land that was broken? A. Yes.

Q. Did you break up any land on the Kolstad properties while you had them under lease?

A. Yes, we did.

Q. About how many acres?

A. It would be right around 3,000 acres.

Q. Could you identify the area in which the 600 acres were cultivated at the time you went on the property if you looked at an aerial photograph?

A. I could pretty close, yes.

Q. On what part of the Kolstad property was that located? [445]

A. That is what they call the Clarence Kolstad.

Q. I wonder, Mr. Meissner, if you would step to Exhibit No. 21 here and point out for the jury on this exhibit where the 600 acres were that you farmed that had previously been cultivated when you went on this place?

A. Right there (indicating)—no.

Q. In order to assist you, I might point out that these black solid lines are the exterior boundaries of the Clarence Kolstad property, so if you

(Testimony of Joe Meissner.)

had that under lease, it would be somewhere within those solid black lines.

A. How about this up here (indicating)?

Q. No, that according to the record so far——

The Court: I think, counsel, you had better let the witness identify it if he can recognize it from the map. Let him say what the boundaries are.

A. That piece right there (indicating).

Q. Now, you are pointing to the middle north portion of Section 5, is that right? What is your answer to that question? A. Yes.

Q. And does that piece contain about 600 acres?

A. No.

Q. Is there other property? Speak up so the reporter and jury and court can hear?

A. There would be some in this section here (indicating). [446]

Q. What section is that? A. Section 4.

Q. I see. All right, now, what portion did you break up in the spring of '48, if you can tell from this exhibit?

A. That section right there (indicating).

Q. What section number is that?

A. Section 9.

Q. All right, if you will resume the stand. Following that additional 200 acres that you broke up in the spring of 1948, did you break any other sod up during that year? A. Yes.

Q. How much?

A. Well, in all it would be about 1400 acres.

Q. Did you break up other lands in the subse-

(Testimony of Joe Meissner.)

quent years that you held the lease? A. Yes.

Q. How much altogether from the time you first went on until you went off the property did you break up?

A. It would be approximately 3,000 acres.

Q. That was during the years 1948 through 1953, roughly?

A. 1948 through 1950, and then we didn't break any more after that.

Q. I see. You stated, I believe, that your average production the first year you were on the place in 1948 was 24 bushels to the acre? [447]

A. Yes.

Q. Do you know what your average production was in 1949? A. Around 14 bushels.

Q. And that is considerably lower. How do you account for that low production in 1949?

A. Well, there was quite a lot of new land and it wasn't quite as wet a year as 1948.

Q. You said it wasn't quite as wet a year as in 1948, and also there was a lot of new land in 1949?

A. Yes.

Q. And does new land have a lower production than older land?

A. As a rule it has the first crop or two.

Q. The first crop or two. How about after that?

A. After that, it usually produces a little better than older land.

Q. Then, does that production remain constant, Mr. Meissner, assuming the same amount of rainfall and other conditions, as the land gets older and older?

(Testimony of Joe Meissner.)

A. Well, I would say pretty much so up until 20 years, if it is farmed correctly.

Q. Up to 20 years? A. Yes.

Q. What happens after that?

A. You notice a let down following that in the older ground. [448]

Q. All right. In 1950, you took a crop off the Kolstad property? A. Yes.

Q. Do you recall your average production in that year? A. It was around 14 bushels.

Q. And in 1951?

A. It was 17, around 17 bushels in 1951.

Q. 1952?

A. In 1952 it dropped down to around 13.

Q. And how do you account for that?

A. Well, it wasn't too good a year that year, it was dry, a little bit dry.

Q. It was dry? A. Yes.

Q. Then did you take a crop off in 1953?

A. Yes.

Q. What was the production in 1953?

A. It was around 22 bushels.

Q. Did you take a crop off after 1953?

A. No, that was the last crop we took off.

Q. Because your lease ended, is that right?

A. Yes.

Q. Do you know what the average is of those six years crops on a per acre basis that you took off these properties?

A. It is around 16 and a half bushels. [449]

Q. Was there any hail during any of those years?

(Testimony of Joe Meissner.)

A. Yes, we had a little hail one year.

Q. What year was that?

A. I think it was '52 we had some hail.

Q. How much damage did that cause to the crop in 1952?

A. Oh, there was 400 acres around 30 per cent.

Q. That was out of how many that you had in wheat that year?

A. That was 400 acres out of about 1800 we had in crop. There was around 30 per cent hail damage.

Q. Now, have you bought any property, Mr. Meissner, in the Tiber area, and I will confine it to Cottonwood Creek on the east and Highway 2 or the Great Northern Railroad on the north, and half way between Chester and Shelby on the West, and the Marias River on the south? A. No.

Q. You haven't bought any property around Cottonwood Creek? A. Yes.

Q. Where is that, how far from Cottonwood Creek? A. It is about two miles east.

Q. I see, it is just outside the Cottonwood Creek area? A. Yes.

Q. When did you buy that property?

A. We settled the deal up last spring in March.

Q. That was in 1956? [450] A. Yes.

Q. What was the first part of your answer, I didn't quite understand it?

A. We closed the deal in March, 1956.

Q. I see. Had negotiations been on before that?

A. Yes, a year before we had negotiated a kind of contract on it.

(Testimony of Joe Meissner.)

Q. You had a contract the year before. Was that contract executed? A. No.

Q. When you closed the deal, were the terms different than the contract?

A. No, they were the same.

Q. Then, as I understand it, you agreed on the price the year before, and then paid that price a year later when you closed the deal?

A. That's right.

Q. Was that a cash deal? A. Yes.

Q. What kind of land was involved in that purchase?

A. Well, part of it was land you could farm, farm land, tillable land part of it was.

Q. Part of it was tillable land?

A. And the balance was grazing.

Q. How much of it was tillable, Mr. [451] Meissner?

A. Approximately 2700 acres.

Q. And what was the total acreage in the farm?

A. 3136 acres.

Q. In buying that property, did you have an agreement with the former owner as to the per acre price to be paid for tillable and the per acre price to be paid for the grazing? A. Yes.

Q. What was that?

A. On the grazing land it was \$10.

Mr. Wiggernhorn: You are asking him to price the land?

Mr. Galles: Per acre, yes.

(Testimony of Joe Meissner.)

Mr. Wiggenhorn: May I ask him a couple of questions before we go any further?

The Court: Yes.

Mr. Wiggenhorn: I understood you to say, Mr. Meissner, this place you bought was east of Cottonwood Creek? A. Yes.

Mr. Wiggenhorn: Do you recognize that land lying to the east of Cottonwood Creek is not of the same quality, not as good land as land in the area the Kolstad places are?

Mr. Galles: I will object to that question. It is cross-examination rather than the purpose for which I thought counsel was going to inquire. I will lay a little further foundation.

The Court: I think you had better. You haven't yet laid the [452] foundation that it was comparable.

Mr. Galles: I thought if counsel didn't object I could do it without taking that time.

Q. (By Mr. Galles): How does the land compare that you bought near Cottonwood Creek with the land you farmed of the Kolstads. I would like to confine that to the tillable lands.

A. Well, I can't see that there would be much difference, it is all pretty good farm land, it would class about the same.

Q. You are familiar, of course, with the property you bought, and you were on the Kolstad property for six years? A. Yes.

Q. Is it the same type of soil?

A. Yes, I would say it is pretty much the same.

(Testimony of Joe Meissner.)

Q. How about the terrain, is it as level or not as level as the tillable land you broke up in the Kolstad properties?

A. This is little leveler land and in little bigger blocks that we bought.

Q. You say the land you bought was a little leveler and a little bigger box?

A. Little bigger blocks.

Q. Well, now, what agreement, and what did you pay per acre for the tillable land that you bought in 1955?

A. We paid \$40 for the tillable.

Q. And how much for the grazing? [453]

A. \$10 for the grazing.

Q. Were there any other considerations that went into that price, were there any improvements on the property?

A. No.

Q. No improvements, and who did you buy that from?

A. From John Brinkman.

Q. He is not related to you in anyway, is he?

A. No.

Mr. Galles: You may examine.

Cross-Examination

By Mr. Wiggenhorn:

Q. With respect to the yields that you testified to in the respective years 1949, 1950, 1951, 1952 and 1953 while you were farming the Kolstad farms, I notice you had no memorandum before you and nothing to refresh your memory. Were you testifying entirely by memory?

(Testimony of Joe Meissner.)

A. No, we done some figuring before we set those yields.

Q. You did some figuring before you set what?

A. Those yields.

Q. You mean before you came into the court-room here?

A. No, sometime ago we checked it over.

Q. How long ago?

A. It has been a couple of years now.

Q. You had the figure a couple years ago, you mean? [454]

A. Yes.

Q. What was your purpose, your object, in figuring it a couple of years ago?

A. Well, the government appraisers——

Q. What?

A. The government appraisers wanted to get an idea of what it yielded, so we figured it out then.

Q. At that time the Bureau of Reclamation men had been to see you and were checking with you and you were giving them the figures?

A. Yes.

Q. What records did you consult when you made those figures up for the Bureau men?

A. Well, we had a lot of those figures because we had given one-fourth of the crop——

Q. I can't hear you very well, Mr. Meissner, I am sorry.

A. We had a lot of the figures because we had given one-fourth of the crop to Mr. Kolstad.

Q. You had been giving what to Mr. Kolstad?

A. One-fourth of the crop.

Q. Had you preserved them from year to year?

(Testimony of Joe Meissner.)

A. Yes, we still have some.

Q. What kind of records did you keep? Of what did they consist?

A. Of these elevator tickets you get when you take a load [455] of grain in. That is a pretty good record.

Q. You still have such tickets? A. Yes.

Q. Do you have full sets of them for each year?

A. Some years we have.

Q. What kind of receptacle do you keep them in to distinguish one year from another?

A. They have dates on them, so you can't go wrong.

Q. You were farming some other land at the time you were farming the Kolstad places?

A. Yes, our own place.

Q. How many acres did you have on your own place of cultivated land?

A. Around 5,000 acres.

Q. Was it just one brother, or two of you?

A. Six of us.

Q. Six of you were all farming in partnership together? A. Right.

Q. You farmed the Kolstad places, plus your own place of about 5,000 acres cultivated?

Mr. Galles: State what your answer is rather than nodding your head so we can get it into the record, please. A. Yes.

Q. Do you likewise have the records, these elevator tickets for the 5,000 acres of your own lands you were farming during [456] that period of time?

(Testimony of Joe Meissner.)

A. No.

Q. Would you be able to tell me why you preserved the tickets for the Kolstad farms, but not for your own?

A. Well, our own farm is pretty much our own. We didn't have to give a crop share, and on the Kolstad farm, we had to give him a crop share.

Q. I might ask you now, do you have the tickets with you? A. I have some of them.

Q. Here in the courtroom? A. No.

Q. Here in Havre?

A. Yes, I have got some here.

Q. Have you consulted them since you have been here? A. No.

Q. You didn't bring them here to the courtroom? A. No.

Q. And you think they are complete. Do they comprise all the tickets for all the sales that were made off the Kolstad place?

A. No, I would have to go through them and check them over. They are probably mixed up a little.

Q. Please talk a little plainer. I can't hear you too well.

The Court: Counsel, maybe you should move closer.

Mr. Wiggenhorn: It isn't a matter of not being able to [457] hear. Maybe the reporter can read the answer.

(Last answer read back by Reporter.)

Q. Well, do you think you have them complete

(Testimony of Joe Meissner.)

for the five years you were farming the Kolstad place? A. No, I don't.

Q. Well, of course, you have given us the average yield. How do you go about figuring the average yield?

A. Well, you just figure what it produced each year and then add them up and divide by the total acres.

Q. To find the total production, that would be adding up all the tickets, wouldn't it?

A. Yes.

Q. That is the total bushels shown by each ticket added all up and divide that by the number of acres that had been seeded and harvested for that year, would you not? A. Yes.

Q. That would give you the average yield, right?

A. Say that again.

Q. I don't want to deceive you the least bit, Mr. Meissner. You add up all the bushels you raised, as shown by the tickets for that given year, do you not? A. Yes.

Q. Then you determine how many acres you have harvested those bushels from, do you not?

A. Yes. [458]

Q. You divide the total number of acres into the total amount of bushels of wheat?

A. Right.

Q. You do then have to know what the total number of bushels raised were, don't you?

A. Yes, you would.

Q. And you have told me just now you don't have all the tickets for each year?

(Testimony of Joe Meissner.)

A. I don't have them here. I could find them if it had to be, but it would be quite a job.

Q. When you say here, just tell us what you mean, here in Havre at the hotel room?

A. I don't have them here in Havre, no.

Q. You don't have them at all here in Havre, or not just the full amount?

A. Not the full amount.

Q. How did you select part of them, by years, or just take a handful of them?

A. No, you have to have each year separate.

Q. When you tell me you don't have them all here, by which I understand you mean here in Havre, how did you happen to bring those you have here? What is the significance of those you have here and those you didn't bring? Do I make myself clear? A. No. [459]

The Court: Why did you bring some to Havre?

A. Well, I had some that I figured were about right in case I had to have them, that is, they were all of one year in one bunch, and I brought some of them.

The Court: Why didn't you bring them all?

A. I would have to hunt them all up.

The Court: You don't know whether the ones you have here are all of the tickets for any one year, then?

A. No, I wouldn't know for sure.

Q. (By Mr. Wiggernhorn): If you were given an opportunity to go to the hotel room or wherever you have them to bring the tickets here, you would

(Testimony of Joe Meissner.)

not be able to bring them all anyway, would you?

A. No.

Q. Would you be able to bring us all for one given year?

A. Well, I believe I could for one given year.

Q. Do you have that year in mind now as you sit here?

A. Yes.

Q. Which year would that be? A. 1952.

Q. That would be the second to the last year?

A. Yes.

Q. If that opportunity is given to you to produce the 1952 tickets, would you be able to produce them reasonably this afternoon after you are excused from the witness stand? [460]

A. Yes.

Q. Did you keep any book record of your production, your wheat production by bushels from the Kolstad places?

A. No.

Q. And all you have, then, in the way of anything to prove the figures you have given us from your head just now are those tickets you have referred to?

A. Yes.

Q. And as to those, the only ones immediately available, at least, would be the 1952 tickets?

A. Yes.

Q. And as I understand you, you have only the tickets from the wheat produced from the Kolstad farms and none of those from your own 5,000 acres, you haven't kept those at all?

A. No.

Q. I understood as well from you, Mr. Meissner, your purpose in keeping these tickets was to show to the Kolstads and prove to them the amount of

(Testimony of Joe Meissner.)

bushels that had been raised for the purpose of determining their one-quarter rental, but that having been once delivered and paid, was there any further purpose for preserving the tickets? A. No.

Q. You might just as well have destroyed them?

A. We just kept them from curiosity to see what we raised.

Q. But with respect to your own farms, with respect to wheat [461] sent to the elevator, you got similar tickets? A. Yes.

Q. You took them home in each instance, didn't you? A. Yes.

Q. You probably kept them until the end of the harvest, or did you throw them away immediately?

A. No, we usually keep them and figure up the wheat when we sell it, figure up the bushels of wheat.

Q. And then throw them away?

A. We don't throw them away, we keep them around, but I don't have them now.

Q. You don't have them any more as I understand?

A. They are at home, but not kept in one particular place.

Q. You have been careful to preserve those from the Kolstad place insofar as you have preserved them, as I understand that? A. Yes.

Q. Did you have any anticipation at the time back in 1949, for example—you have them for 1949, do you? A. I could find them.

(Testimony of Joe Meissner.)

Q. When you had them in 1949, did you anticipate at that time, having settled with the Kolstads, that you would ever again have use for them?

A. No.

Q. You are sure you haven't confused the tickets you have [462] for the wheat harvested from the Kolstad places with those harvested from your own 5,000 acres?

A. Well, when we hauled the wheat off their place, we always had it marked "Meissner and Kolstad," and when we hauled the wheat off our own place, it was marked "Meissner."

Q. Yes, I appreciate you marked them. What I am interested in is whether or not when you were figuring the averages for each given year you might have confused them?

A. I wouldn't say it is impossible. One might have slipped in or out.

Q. You also gave us, in addition to the average for each year, you gave us the average for the five years, the average production per acre, did you not?

A. Six years, isn't it?

Q. Well, six years. I thought it was five. You had a crop in 1948, too?

A. Yes.

Q. Well, for the six years, you also figured the average production for that full period, did you not, per acre?

A. Yes.

Q. We just went through the process of how you figured the average for each year. When you figured the average for the six years, did you take the averages for each year and then proceed to average those

(Testimony of Joe Meissner.)

to determine, was it 16 bushels you stated as the average? [463]

A. Around 16 and a half.

Q. When you figured the 16 and a half, did you arrive at that by taking the averages for the six years and then averaging those out, or how did you do it?

A. Totaled the six years and then divided.

Q. I want to be sure I know what you mean, totaled the six year average or totaled the bushels for the six years?

A. Totaled the bushels and totaled the acres and then divided.

Q. You totaled the bushels and totaled the acres. You didn't have the same number of acres cultivated each year, did you, they were not constant?

A. No, they varied.

Q. You kept on building up and putting more land into cultivation? A. Yes.

Q. Some of which was new land, because you only started with, was it six or eight hundred acres?

A. Around 800 acres.

Q. But 200 of that was new, too? A. Yes.

Q. So you really started with 600 acres, and all of the rest of your acres—you broke up 3,000 more—was new land?

A. There was some other stubble land on the place we summer fallowed in 1948. [464]

Q. At least 3,000 acres of it was new land?

A. Yes.

(Testimony of Joe Meissner.)

Q. That, as I understood you to say, does not produce so well for the first few years?

A. As a rule it does not.

Q. When did you do the computing to arrive at the 16 and a half bushels for the six years?

A. We done it every fall.

Q. When did you do the six years? You couldn't do that every fall because you had to wait until the finish.

A. For the total, it was two years ago.

Q. Was that done for your own information, or again for the Bureau of Reclamation?

A. It was partly for our own and the Bureau of Reclamation.

Mr. Wiggenhorn: No further cross-examination.

Mr. Galles: That is all, thank you.

The Court: Call the next witness.

Mr. Galles: I wonder if this witness may be excused, it is agreeable with counsel.

The Court: Very well, he may be excused.

Mr. Wiggenhorn: I would like to ask leave of court—whether he would be agreeable to getting his 1952 tickets and being recalled?

The Court: Mr. Meissner, will you return to the room or wherever you have the elevator tickets you testified about and [465] bring all you have with you back to court right away?

The Witness: Yes.

The Court: Very well.

(Witness excused.)

THOMAS VIRDEN

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. State your name and where you live?

A. Thomas Virden; I reside at Billings, Montana.

Q. What do you do there?

A. I am employed by the Bureau of Reclamation.

Q. In what capacity? A. Land Appraiser.

Q. How long have you been so employed?

A. Since 1948.

Q. How old are you, Mr. Virden?

A. 58 years old.

Q. Where were you born, raised and schooled?

A. I was born in Converse County, Wyoming, I grew up in Converse County, I attended high school in Converse County, and I attended Iowa State College at Ames, Iowa.

Q. Following your formal education, what did you do? [466]

A. I didn't understand your question.

Q. Following your formal education, what did you do?

A. I was born and raised on a ranch on which I still resided after I had completed my education, and I continued there with my father until he disposed of that property, which was in 1919. After

(Testimony of Thomas Virden.)

that time, I was employed in a bank, and I worked in that institution until 1927. I then worked for the State of Wyoming, State Department of Agriculture for four years. At the end of that four years, I purchased a ranch property. During that time I was still connected with the bank which I had worked in and was a stockholder and director in that bank.

Q. What kind of a ranch did you purchase?

A. It was a livestock ranch, irrigated land raising hay, grain, cattle and sheep.

Q. How much banking experience and ranching experience have you had?

A. Well, my banking experience would be over a period from 1923 until 1946; it would be 23 years. The ranching experience would be from, that is, as the owner and operator of a ranch—I had had previous experience as a boy—but as an owner-operator, that experience would be from 1926 until 1947, which would be 21 years.

Q. In 1946, did you sell your ranch, then?

A. 1947, I sold that ranch. [467]

Q. Then what did you do?

A. I bought another ranch in Sheridan County, Wyoming.

Q. Did you operate that?

A. I operated that ranch for one year and disposed of it.

Q. By selling? A. Yes, sir.

Q. Then what did you do?

(Testimony of Thomas Virden.)

A. Then I came to Billings and obtained a job with the Bureau of Reclamation as a land appraiser.

Q. That was in 1948? A. That's right.

Q. And you have been employed by them ever since? A. Yes, I have.

Q. What type of land appraisals have you done for the Bureau of Reclamation?

A. Well, in our program, we acquire land in fee title and easements on land for the construction and maintenance of transmission lines, canals, reservoir storage areas, power station sites.

Q. And how many acres, if you know, or how many appraisals have you made for the Bureau of Reclamation?

A. I don't know just how many by number of appraisals I have made for the Bureau of Reclamation, but if I may refer to my notes, please.

Q. Can you remember without referring to [468] them?

A. Yes, I can remember, approximately, without referring to them. I have appraised about 100,000 acres of land in Montana; I have appraised about 300,000 acres of land in Wyoming, and 70,000 acres in South Dakota.

Q. And was that all types of land?

A. Yes, it was.

Q. Any city property involved? A. No.

Q. Have you qualified as an expert in any court?

A. Yes, I have.

Q. In how many?

A. South Dakota, Wyoming and Montana.

(Testimony of Thomas Virden.)

Q. And you have qualified in this court previously as an expert? A. Yes, I have.

Q. Are you acquainted with the Kolstad properties involved in this action, the three separate parcels? A. Yes, I am.

Q. When did you first become acquainted with them?

A. Well, generally, I became acquainted with them or with this area in 1949. I appraised a right-of-way for a transmission line from Shelby, Montana, to Havre, Montana, a distance of 106 miles.

Q. And then when did you—you didn't make an appraisal of the whole property at that time? [469]

A. No, I said I just became generally acquainted with the area, not with this particular property, just with this area. That was my first work in the Chester area, this easement across that area for this transmission line. Then, in 1952, I made some appraisals in the storage area of the Tiber Dam; then, again in 1954, was the first time that I remember distinctly that I was on Mr. Clarence Kolstad's property. I was on there in 1954, in the month of May.

Q. What did you do then?

A. Well, I went over that area at that time for the purpose of becoming acquainted with the terrain of the land and the operations of the land, the location of the streams and the type of soil; also the location of the improvements, the fences, and just to become generally acquainted with the property. Then I later—not this same time, but some days

(Testimony of Thomas Virden.)

later, I went back on the property after I had prepared a map more or less in outline of the lake and the legal description of the property and oriented myself on the map by making notations on the map of the different physical characteristics of the land.

Q. And then what did you do?

A. I don't remember then if I was—there was so many different times that I was in this area, but I did make a map of the property at that time and checked the map on the property. Shortly after that I interviewed Joe and Ernest [470] Meissner, who were at that time, leasing the property. I interviewed them for the purpose of obtaining from them all the information I could about their operation on the property. I also made a check—at that time I believed it was the Production Marketing Office, the P.M.A. office—to determine what I could from the record that they had for wheat production on this land, and the total amount of acreage of crop land which had been determined by them.

Q. That was the P.M.A. office where?

A. The P.M.A. office in Chester.

Q. You checked the records with reference to the Kolstad property?

A. That's right. Then, afterwards, I returned and did some more work on this property. I interviewed the Meissner boys again, and obtained from them their estimate of their production of wheat on the property up to that date.

Q. Now, were you there when they made that estimate or calculation?

(Testimony of Thomas Virden.)

A. When I was there, they had elevator tickets, and as I recall, some other records which they had kept, and that was their collective opinion, the figures they gave to me was their collective opinion of the yield that they obtained from this property for the years up to that time.

Q. You heard him testify. Did he testify today to the same figures as he gave you when you were there in 1954? [471] A. Yes, I think so.

Q. All right, then what did you do, Mr. Virden?

A. I wasn't back to do any work in this area until in December of 1955. I came back here, and to refresh my memory on this property and other properties, I went out over the land and observed what I would say was the operation of the property since the last time I had viewed it, and also in addition, any other lands that might have been put under cultivation since I had been there, since the last time I had been there.

Q. Then what?

A. I did find that there had been additional land put under cultivation since the last time I had been on the property. I at that time made a new map of the property, which I developed from an aerial photograph by taking a tracing from the aerial photograph. I took that to the field and very carefully went over all the land and developed this tracing from the aerial photograph to correspond with what I found to be true in the field.

Q. Was that about the extent of your field work?

A. No, at that time I spent about a week in the

(Testimony of Thomas Virden.)

field around the Chester area in Liberty County, and also in Toole County, checking sales.

Q. What sales did you check, or how did you check them?

A. Well, to begin with, through another employee of the [472] Bureau of Reclamation, he had obtained from the County records in both Toole County and Liberty County all of the land sales which had transpired in those two counties since 1952. That, I believe, amounted to about 140 sales.

Q. Did you look at all those sales?

A. No, I did not. I went through those sales and I sorted them out. There were sales that I, of course, knew would not be comparable, then for other reasons there were sales that had not been completed, and there were sales that had been made under different circumstances, between relatives and such like, and I did not consider any of those sales. I did try to find the largest sales of land with an appreciable amount of tillable land involved, and those were the sales which I inspected.

Q. How many sales did you finally end up with that you gave consideration to?

A. I finally gave consideration to 10 sales, six in Liberty County and four in Toole County.

Q. Were those large sales or small sales with regard to size?

A. They were the 10 largest sales which included an appreciable amount of wheat land which I was able to find from a complete list of all sales that had transpired in the two counties since 1952.

(Testimony of Thomas Virden.)

Q. Up until what date? [473]

A. Up into 1955. There was some sales, some of these sales were made in 1955.

Q. Were any of them made after the date of taking, May 24, 1955?

A. Can I refer to my notes? I am not sure, I don't think so. If so, the date was very, very close.

Q. All right. Did you do anything else, then, in connection with your appraisal of this land?

A. Yes. After checking the sales data, I prepared a preliminary appraisal on the land. I was not entirely satisfied with the information which I had on some of these sales, and I had the opportunity of being back here and returning and re-checking some of those sales and becoming a little better acquainted with them. Also, if I may go back, in 1954, I made quite an extensive inquiry from real estate agents in Great Falls and here in Havre.

Q. That was with reference to what?

A. That was with reference to land, to our program on the acquisition of land in the Tiber area. That is fundamentally the reason why I did that, but the information I received, of course, was for this general area in Liberty and Toole Counties.

Q. With the idea of determining what kind of value?

A. Well, with the idea of determining a fair market value of this land, based on their [474] opinion.

Q. Now, Mr. Virden, I assume that you have an

(Testimony of Thomas Virden.)

opinion of the fair market value as of May 24, 1955, of these three parcels of land involved in this action?

A. Yes, I have.

Q. I hand you an exhibit marked Exhibit 29, consisting of three pages, and ask you to state generally what this is?

A. This is a copy of my estimate of the fair market value of the entire unit, and likewise of the remaining unit which, when subtracted from the value of the entire unit, would give the fair market value which has been given by me to the three different parcels of land.

Q. Each page representing the different ownership involved in this action?

A. Yes, I might state these have been prepared by me since January 1st, when it developed that this property was to be appraised in three separate parcels.

Q. When working on it prior to that time, you worked on it as one ownership and one piece of property?

A. That's right.

Q. Since last month, you developed these figures upon the basis that there are three parcels involved?

A. Yes, sir.

Q. What is your opinion of the fair market value of the property standing in the name of Clarence A. Kolstad before [475] the taking, fair market value as of May 24, 1955?

A. \$213,639.60.

Q. And without reading all of the number of acres and the extended price, would you state the

(Testimony of Thomas Virden.)

classifications and the value per acre for each classification that you assigned?

A. Irrigable crop land—the value which I will repeat is the per acre value—\$100; old crop land, \$65; new crop land, \$40; bottom land, \$30; upland tillable, \$25; upland grazing, \$10.

Q. Now, you have on this exhibit on the first page the number of acres involved for each classification, as well as an extension of the number of acres at the rate or price per acre, giving an extended summation over on the right-hand side?

A. I do.

Q. And that all totals to the figure you gave in the first instance as the value before taking?

A. Yes, sir.

Q. Now, do you have an opinion of the value of the Clarence Kolstad property remaining after the taking, the fair market value as of May 24, 1955?

A. Yes.

Q. Would you state what that is?

A. \$58,030.50.

Q. Now, again, with just giving the classification and the [476] rate per acre, would you state what is on the exhibit?

A. The classification, old crop land, \$65 per acre, upland tillable, \$25; upland grazing, \$8; other grazing, \$1.

Q. Now, your per-acre values on the crop land and tillable land is the same as first assigned, isn't it?

A. Yes, it is.

Q. But your after value on the grazing and cer-

(Testimony of Thomas Virden.)

tain other grazing is reduced? A. Yes, sir.

Q. Would you state how much it has been reduced and for what reason?

A. On 373.5 acres, the grazing has been reduced \$2 per acre for the reason that this block of grazing is not all contiguous; it has been broke into smaller tracts.

Q. And then you have another portion of grazing land which you have assigned a different value?

A. Yes, I do, 120 acres at \$1 per acre.

Q. Why did you assign that \$1 value?

A. There is one parcel of 80 acres south of the Marias River, I don't recall the section there now, and another parcel of 40 acres up in the northwest part there that have been entirely isolated from the remaining ownership by the taking.

Q. Can you identify those on this exhibit No. 24?

A. Yes, sir, the southeast quarter of the southeast quarter [477] of 20, and the southwest quarter of the southwest quarter of 21.

Q. Would you point to that land?

A. Yes, this 40, and this 40, and also—that is in one township, this is another township, and it would be the southeast quarter of the southeast quarter, Section 31, up here (indicating).

Q. Now, you have pointed to the portion at the northwest end of the largest tract shown on this exhibit which is outside of the taking area?

A. That's right.

Q. Now, with reference to the next ownership—I believe that is the Alta Kolstad property—do you

(Testimony of Thomas Virden.)

have an opinion as to the fair market value as of May 24, 1955, of her entire ownership before the taking? A. Yes, I do.

Q. Would you state what that is?

A. \$150,001.20.

Q. And again without reading the number of acres involved, would you give the classification and the rate per acre you have assigned to it?

A. Old crop land, \$65; new crop land, \$40; bottom land, \$30; upland tillable, \$25; upland grazing, \$10.

Q. Do you have an opinion of the tract remaining to Alta Kolstad, after the taking, that is, the fair market value as [478] of May 24, 1955?

A. I have.

Q. State what that is, please?

A. \$90,300.22.

Q. And the per acre values assigned the various classification are what?

A. Old crop land, \$65—we have a typographical error here—this should be new crop—no, I beg your pardon, this is correct, a separate tract of old crop land, \$55.

Q. Now, you have two types of old crop land; one at \$65 and one at \$55 in the remaining tract?

A. That's right. Upland tillable, \$25; upland grazing, \$8, and one isolated 40 at \$1 per acre.

Q. Now, would you point out where the two old crop land tracts are that you have assigned a difference of \$10 an acre to, and the isolated 40 acres of grazing, as compared to the remaining grazing?

(Testimony of Thomas Virden.)

A. The isolated 40 of grazing is this 40 right here (indicating), which I think is the extreme east side of the ownership.

Q. You are referring to Plaintiff's Exhibit 25, and pointing to the extreme east colored portion of the map?

A. That's right. The old crop land which I valued at the same price is this crop land within the taking over here, which involves all of this which is colored blue inside of [479] the dense black line, the heavy black line. The crop land which I referred to at \$55 per acre is the crop land outside of the heavy black line across on the opposite side of Willow Creek and to the south and west of Willow Creek (indicating).

Q. It is isolated from the other remaining tracts?

A. Yes, the water backs up right in here (indicating). Counsel, I misspoke myself where I said inside the heavy black line. It would be outside of the heavy black line. That land, this, and this, and this (indicating).

Q. Now, with reference to—pardon me—strike that, please. What is the difference between the before and after values, Mr. Virden?

A. \$59,700.98.

Q. Do you have an opinion of the fair market value of the Clarence Kolstad and Alta Kolstad property held jointly as of May 24, 1955, before the time of taking?

A. Yes, I have.

Q. What is that? A. \$204,347.10.

Q. And without giving the number of acres,

(Testimony of Thomas Virden.)

what classifications and per acre value did you assign?

A. Irrigable crop land, \$100 per acre; old crop land, \$65 per acre; new crop land, \$40; bottom land, \$30; upland tillable, \$25; upland grazing, \$10. [480]

Q. Any improvements on this property?

A. Yes, there was.

Q. What value did you assign to the improvements? A. \$4,110.

Q. Now, do you have an opinion of the fair market value as of May 24, 1955, of the land remaining to the Kolstads in the joint ownership?

A. Yes, I do.

Q. State what that is? A. \$101,749.20.

Q. And the classifications and per acre value?

A. Old crop land, \$65; upland tillable, \$25; upland grazing, \$8.

Q. Now, you have just made a reduction of \$2 in the grazing and the other classifications remain the same, is that correct? A. That's right.

Q. Why do you reduce the grazing in this joint ownership?

A. For the same reason that I did on the other parcels, due to the fact that it is more or less segregated now, and not quite as usable as it was before.

Q. What is the difference between the before and after values you have given?

A. \$102,597.90.

Q. Now, the other figures that you have on this exhibit, Mr. [481] Virden, the number of acres, and

(Testimony of Thomas Virden.)

the extended price, and the other information, was that prepared by you or under your supervision?

A. It was all prepared by myself.

Q. And you know the other figures to be correct without reciting for the record each one?

A. I trust they are.

Mr. Galles: Offer in evidence Plaintiff's Exhibit 29.

Mr. Schiltz: No objection.

The Court: Very well, it is admitted.

(Plaintiff's Exhibit 29, being the summation sheets above referred to, was here received in evidence.)

Q. Now, in arriving at those figures, Mr. Virden, how did you arrive at the per acre values you have assigned to the various classifications?

A. Well, I arrived at the per acre value of the wheat land from my opinion of the market value which I found in the 10 sales which I selected as being in many respects representative of this property, or similar to this property, I would say.

Q. And the other values?

A. The other values were determined from sales which I had knowledge of for similar types of land, and from the productivity or capacity of the irrigable land and the bottom lands. [482]

Mr. Galles: You may examine.

Cross-Examination

By Mr. Wiggernhorn:

Q. With respect to these sales, you said you took

(Testimony of Thomas Virden.)

10 into consideration. Do I understand that none of them were sales occurring after the date of taking?

A. I don't think I gave a definite answer to that. If I may, shall I check?

Q. The question was asked you, but there was no answer on it. You say you can check on it right away?

A. Yes. No, there were none after. There was one the day before that, but none after.

Q. Does the Bureau of Reclamation follow any sort of policy in that regard about not considering any sales after the date of taking? Are you instructed to do that?

A. No, sir, we are not. We do consider sales that are made reasonably soon after the date of taking.

Q. When and where was it you talked to the Meissners?

A. I talked to them at their ranch.

Q. At their ranch? A. Yes, sir.

Q. What year was it?

A. The first time I talked to them was in May, 1954. I believe the second time was November, 1954. I am not [483] positive of that date, but I believe it is november, 1954.

Q. You went to them to get production records, is that what you went to see them for?

A. It was one of the things I went to see them for.

Q. Did you ever go to Mr. Kolstad, himself, to get his production records?

A. No, sir I never.

(Testimony of Thomas Virden.)

Q. Never made any effort to. I notice on your Exhibit 29, your tabulation, you make a differential, I think it is uniform for the three places, in your value for old crop lands over new crop lands, of \$25, that is, \$65 for old crop land and \$40 for new, is that true? A. That's right.

Q. You justify that by the fact that new crop land doesn't produce so well?

A. That's right.

Q. You know something about farming, I understand, you have been farming yourself, but you were not probably a wheat raiser, though; how about that?

A. No, not for myself, I never raised any wheat.

Q. Your contact and experience with the appraisal of wheat land has been entirely for the Bureau of Reclamation? A. Yes.

Q. That has been in recent years, because you told us you started working for them in 1948? [484]

A. Yes.

Q. Do you, in the experience you have had in the eight years since working for the Bureau of Reclamation, do you know it to be a fact that it takes only a few years—Mr. Meissner, himself, testified to it a minute ago—before new crop lands are as productive as old, after they once have been in production? A. Yes, I understand.

Q. But you make a \$25 differential in value?

A. Yes.

Q. Were you valuing it only for the matter of the crop produced in that year?

(Testimony of Thomas Virden.)

A. No, I was valuing it for land as of May 24, 1955. This land which we referred to here was plowed in November, or in the fall of 1954. There was in the combined places, there was——

Q. Let's not get confused. I would rather you didn't combine them. Let's take each place by itself.

A. On the Alta A. Kolstad, there was 256 acres of new crop land, and that was land which had more slope. I don't think that the soil was quite as good, and there was some of that land that showed evidence of being somewhat stony. Now, I was on that land this fall, and my opinion was more or less arrived at at that time, and I noticed that the stubble was considerably shorter on that land than it [485] naturally would have been because the crop harvested there this year was the first crop that had been harvested off of that land.

Q. It is my conclusion inevitably, then, Mr. Virden, that it wasn't alone because of its being new crop land that you made the price reduction of \$25 per acre, but because of other characteristics such as you have mentioned, is that right?

A. That's right.

Q. Even though it had been old crop land, you would have appraised it at a lower figure because of its being stony, rougher and sloping?

A. If it were characteristic, it would bring it to your attention as being different from the other crop land, yes, you would.

Q. With respect to the Alta Kolstad place, you

(Testimony of Thomas Virden.)

appraised it, as you did in the others, the before value of the old crop land at \$65 an acre?

A. Yes, sir.

Q. Then, I understand you reduced that value by \$10 for the old crop land after the taking?

A. That's right.

Q. I call your attention to the fact that before the taking, you have classified 1,523.5 acres as old crop land, which you ascribed this \$65 an acre value to, while after [486] the take, there are only 267 acres in this one parcel of old crop land that you put a \$55 value to, I think you told us, but on her farm, that reduction of \$10 was due to the fact of that size of 267 being a small unit?

A. No, it was not.

Q. What was the reason?

A. The reason was it was isolated from the other property by the land which is being taken.

Q. Don't you make any distinction at all as to the size of the units in valuing crop land?

A. That could be considered in this \$10 reduction.

Q. And you think there should be no greater differential, no greater difference in value than \$10 for a 267 acre tract?

A. I think I have made a liberal allowance.

Q. You think 267 acres can be operated as an economic unit?

A. I didn't say it could.

Q. Well, do you think so?

A. You mean just 267 acres and no more?

Q. That's right, 267 acres and no more.

A. Not dependent just entirely on the 267 acres.

(Testimony of Thomas Virden.)

Q. That is the question I am asking you. You are willing to confess it can't be operated as an economic unit?

A. I wouldn't want to, no. [487]

Q. At least you are ready to stand by that, as I understand you, you still think a unit of 1,523.5 acres at \$65 an acre is a fair comparison with 267 acres at \$55? A. Yes, I am.

Q. You would just as soon have one as the other at those prices? A. That's right.

Q. Mr. Virden, you have been appraising now for eight years for the Bureau of Reclamation?

A. Yes.

Q. And all these appraisals you have told us about, they were all made for one customer, were they not, the Bureau of Reclamation?

A. Yes, sir.

Q. Your entire appraisal experience, professional or whatever it might be called, has been for one customer alone?

A. Not all my experience, no.

Q. You spoke about appraising some dwellings, was it?

A. No. The question was asked if I had had experience with the Bureau of Reclamation in residential appraising, and I said no.

Q. You might tell us your prior experience in appraisals, where was that, and what kind of land?

A. My previous experience was when I was in or connected with the banking business, and I also did work for the [488] First National Bank of Omaha, in livestock—National Bank of Omaha, as

(Testimony of Thomas Virden.)

an appraiser and inspector for loans for that bank, and while many of those loans primarily were secured by livestock we often times made an appraisal of the property that was supporting this livestock.

Q. Then that was primarily livestock appraisal, was it not?

A. I wouldn't say that exactly because back in the early thirties, in times of distress, these loans became rather burdensome, and additional security was taken on land where it was available.

Q. That experience was additional to what you have had for the Bureau of Reclamation?

A. That and buying and selling and owning lands of my own.

Q. None of the lands were of this character, wheat lands, in your own case?

A. I wouldn't say there was any wheat land.

Q. And you haven't been buying or selling or owning wheat lands, have you?

A. No, I have not.

Q. The last eight years, at least, your professional activities as an appraiser have been entirely for the Bureau of Reclamation?

A. I have been employed by the Bureau of Reclamation full time for the past eight years. [489]

Q. Do they have certain methods and practices that they instruct your appraisers in, technique?

A. Not too specifically. Generally, we try to follow accepted appraisal methods.

Mr. Wiggenhorn: That is all.

Mr. Galles: That is all.

(Witness excused.)

(Jury admonished—10-minute recess.)

Mr. Galles: Henry Murray.

The Court: Just a minute, Mr. Meissner is back. If you want to use him now, I think this would be the proper time.

Mr. Wiggenhorn: I was going to inquire, your Honor. He has been up to see me and talked to me during the recess. He told me he has the tickets here. I haven't seen them yet, I haven't had a chance to check them.

Mr. Galles: Did you ask him for them?

The Court: Put him on the stand and get the tickets, they will be in court, then.

Mr. Wiggenhorn: It will take a little time after getting him on the stand to add them up. I don't want to make the same mistake in arithmetic Mr. McHale made.

The Court: Come forward, Mr. Meissner.

JOE MEISSNER

recalled as a witness on behalf of plaintiff, having previously been [490] sworn, testified as follows:

Examination

By the Court:

Q. Come up here and take the stand. Do you have the tickets that you have in your possession?

A. Yes.

Q. Do they just cover, do they just refer to the land of Mr. Kolstad, that you leased from him?

A. Yes, but they are not all there, though.

Q. Not all of them are here? A. No.

Q. Are all of them for any one year?

(Testimony of Joe Meissner.)

A. For 1952.

Q. All of the tickets for 1952 are here?

A. Yes.

Q. With some other tickets for various other years?

A. Yes, and there is also tickets in there that would be applied to land of Henry Kolstad that we farmed in that lease of Clarence Kolstad.

Q. Some of these tickets then cover land belonging to Henry Kolstad? A. That's right.

Q. Can you distinguish the tickets here that refer to Henry Kolstad's land?

A. No, I could not.

Mr. Wiggenhorn: May I ask a question? [491]

The Court: Oh, yes, indeed, I was just going to have them marked so they will be in the Court's possession and you can examine them at another time.

Further Cross-Examination

By Mr. Wiggenhorn:

Q. Then, as I understand you, Mr. Meissner, neither you nor I nor the Court nor anybody else going through the tickets could segregate the tickets that represent wheat marketed from the three Kolstad places that are here before this jury, the Clarence Kolstad place, the Alta Kolstad place, and the place owned jointly by them? Do you understand my question? A. Yes.

Q. What is your answer?

A. I would say no.

Q. You couldn't do that? A. No.

(Testimony of Joe Meissner.)

Q. So, we don't have any authentic information from these tickets that would support the average per acre yield you have testified to, do we?

A. Not the acres you used.

Q. I am not using anybody else's acres, not Henry Kolstad's acres. Just because he has the same name, he is not to be confused with Clarence or Alta Kolstad, is he? [492]

A. Right.

Q. I don't want to leave you without having some explanation. Do you have any further explanation of how you arrived at those average yields? I want to give you an opportunity, every opportunity, if you can tell us.

A. When you farm a piece of land and you give a share off of it, you have at the end of the year a pretty good idea about what the crop yielded.

Q. You don't get it by just figuring it in your head, you have to have some authentic information or sales tickets to show just how many bushels you yielded from that place, don't you?

A. Yes, you have to have all the tickets and figure it up to get your one-quarter crop share.

Q. I call your attention also to the fact that quite a long time has gone by since 1952, and you are now testifying to an exact fact. Do you have anything further to say about that?

A. Well, I would say there could be a slight variation.

Q. Are you testifying from memory or are you testifying from records?

A. Well, it is more from memory.

(Testimony of Joe Meissner.)

Mr. Wiggenhorn: That is all. [493]

Redirect Examination

By Mr. Galles:

Q. Mr. Meissner, you computed the averages you testified to a couple years ago, you said. Was that in 1954, when Mr. Virden called on you?

A. Yes.

Q. What elevator tickets did you have available at that time for the Kolstad properties?

A. Well, we had those tickets, but we didn't refer to them.

Q. How did you arrive, then, at the average that you now testified to, and that you figured when Mr. Virden was there?

A. Three years we got that average out of the A.S.C. office in Chester.

Q. Which three years?

A. The last three years.

Q. Yes.

A. And the other two years, we just kind of figured an estimate on it.

Q. I see. You gave these figures on the stand to-day from your memory of what you calculated in 1954?

A. That's right.

Q. And you had it marked down in the meantime, and remembered it in that manner? [494]

A. Yes.

Q. And you think that there is a possibility of an error in your averages. Do you think it is low or high, or is that the best estimate you can give?

(Testimony of Joe Meissner.)

A. I would say for the average for the six year period, it would be pretty close, but it could vary one year to the other because there was a few years we held wheat over to the following year before we sold.

Q. But the average for all the time you farmed it which you gave at 16 and a half bushels, you think is a good estimate of what the land produced for you while you were farming it? A. Yes.

Mr. Galles: That is all.

Recross-Examination

By Mr. Wiggernhorn:

Q. Before, when I examined you, you mentioned the fact that in addition to the three Kolstad places we are trying here now, you had farmed 5,000 acres of your own, six brothers of you, that is true, isn't it? A. Yes.

Q. Now, it is disclosed that you had still another place you were farming for at least part of this six year period; that was the Henry Kolstad place, which has no relation to [495] these places at all?

A. Yes, we had this Clarence Kolstad place leased——

Q. I know that there is no significance to Henry Kolstad just because he has the same last name. It is just another place just as though his name was Jones, isn't it?

A. It didn't, but I guess I will have to explain it to you.

Q. Well, explain.

(Testimony of Joe Meissner.)

A. See, Henry Kolstad had some land in with the Clarence Kolstad place——

Q. Do you mean that he has some land in with Clarence Kolstad's land?

A. Adjoining, and they traded that particular land for some on the south side of the river, and we went ahead and farmed Henry Kolstad's land along with Clarence Kolstad's land, and it all went the same way, and I presume Clarence Kolstad settled with Henry Kolstad on the crop share money. We gave him one-fourth of it.

Q. I believe I understood you to say also that you got some, you think you got some of the records of the number of bushels that were harvested from the Clarence Kolstad and Alta Kolstad property, and their joint places, the three of them, from the A.S.C. office?

A. Yes.

Q. What is the A.S.C. office, by the way? [496]

A. Well, it was the Allotment Office in Liberty County, I guess.

Q. Well, they wouldn't know the number of bushels that were raised on the place except as you reported it to them, is that true? They are not present when you harvest your crop, no representative from that office?

A. No, they aren't.

Q. How do they get the records you spoke of you got there of the number of bushels you produced unless you gave them to them?

A. Either we would have had to give them to them, or Mr. Kolstad. I don't know which source they got them from; I couldn't say.

(Testimony of Joe Meissner.)

Q. But you think you found them there?

A. Yes, they have them there.

Q. You don't recall how many bushels their records showed for those three years you spoke of?

A. Well, it was supposed to be the same as I have on this paper here.

Q. You haven't referred to any paper up to this moment.

A. Well, let's see, the last three years it would be that I am referring to.

Q. Do you have some sort of a paper you are relying upon as a memorandum for your testimony here? [497]

A. Yes.

Q. I wonder if I could see that. Do you have it in your pocket?

(Witness produces document.)

Q. I notice it is typewritten; who did that for you?

A. Mr. Virden typed it over.

Q. Mr. Virden, the witness who just testified here a minute ago, he typed this up for you?

A. Yes, I have one here, I scribbled one myself.

Q. Where did he get the information we find on this typed sheet?

A. That was the information we got together.

Q. That is, you and Mr. Virden got together on it, you say?

A. That is the one we made up, yes, at that time.

Q. You don't mean to say he furnished some of the information that is here appearing, do you?

A. No.

(Testimony of Joe Meissner.)

Q. I notice you have for 1952 reported on this sheet, this memorandum of yours, 1,718 acres. Don't you know, as a matter of fact, that for 1952, the Allotment office showed 18 hundred and some acres under cultivation on these three Kolstad places we are concerned with here? I'll give you the exact amount, 1,854. A. 1,854?

Q. Yes, for 1952. [498]

A. I don't know where that error would come in it.

The Court: Tell me, Mr. Meissner, the figures you talk about that are in the A.S.C. office; did you get them there, or did somebody else get them there and give them to you?

A. Somebody else got them.

The Court: Who got them and gave them to you?

A. Mr. Virden.

The Court: Mr. Virden?

A. Yes.

Mr. Wiggenhorn: No further questions.

The Court: That is all, you may step down. I have marked them so that if necessary you could examine them, Mr. Wiggenhorn, but Mr. Meissner, when the case is finally disposed of, if you want these back again, let the United States Attorney know, and we will see to it you get them back.

(Witness excused.)

HENRY MURRAY

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. Henry T. Murray. I reside in Missoula, Montana.

Q. What do you do, Mr. Murray? [499]

A. I am an appraiser.

Q. And how long have you been in that profession?

A. Well, a matter of 10 or 11 years, something like that, part time, that is, I have been gradually working into it over that period of time, with the extent of work varying from year to year, but the last couple years, it has been exclusively real estate appraisal.

Q. What has been your formal education?

A. Well, to start with my college training, after putting in 41 years of ranching, I sold out and went to Bozeman and got my Bachelor of Science in Animal Husbandry in 1939, and a Master of Science in Agricultural Economics in 1942.

Q. Have you had any other special training?

A. Yes, I have taken special work appraisal offered by the American Institute of Real Estate Appraisers cooperating with the University of California. I took work there, and I took similar work with the Institute cooperating with the University

(Testimony of Henry Murray.)

at Utah; and I have also taken the work offered by the Society of Farm Managers and Residential Appraisers put on in cooperation with the University of Nebraska.

Q. Have you had any farming experience yourself?

A. Yes, I put in all my adult years operating a livestock and grain farm in Central Montana, that is, 21 years.

Q. Where in Central Montana?

A. Judith Basin County. [500]

Q. You raised wheat on that farm?

A. Yes, wheat and livestock.

Q. Now, do you belong to any professional societies?

A. Yes, I am fully accredited by the American Institute of Real Estate Appraisers with the professional designation M.A.I. I am also fully accredited by the Society of Farm Managers and Residential Appraisers, with the designation of Accredited Rural Appraiser, A.R.A. is the designation.

Q. Your M.A.I. designation, that is the same organization Mr. Holbrook belongs to that testified in this case? A. Yes.

Q. You heard him testify to the qualifications to become a member?

A. I fulfilled those requirements, yes.

Mr. Wiggenhorn: May I suggest that is not his testimony?

Mr. Galles: I am sorry. I understood——

(Testimony of Henry Murray.)

The Court: It is not a correct manner in which to examine a witness, in any event, so the objection is sustained and the answer is stricken and the jury admonished to disregard it. If you want to examine with reference to it, go ahead.

Q. What are the requirements to become a M.A.I.

A. As I recall off hand, a candidate must be 30 years of age, he must submit to a series of written examinations covering the appraisal field; he must submit three different formal appraisals covering different classes of property that [501] he had done himself, and have five years of experience before admission to the institute. Those are the major requirements. There are some others, I believe.

Q. And a man in the real estate business just doesn't become a member by making application, as Mr. Wiggenghorn put it?

A. No, that is for sure.

Q. Have you published any articles in the real estate appraisal field?

A. Yes, I have an article on farm and ranch appraisals that was published by the Appraisal Journal.

Q. That is the journal for what organization?

A. The professional quarterly for the American Institute of Real Estate Appraisers.

Q. How many appraisals have you made, or what part of the country have you covered in your appraisal work?

A. Well, I had an assignment covering about 160,000 acres for the Shoshone and Arapahoe Tribe

(Testimony of Henry Murray.)

in Central Wyoming, 300,000 acres of farm and ranch land in Central Oregon in 1952; again this year I done approximately 60 tracts in the State of Oregon; I represented the land owners in the appraisal of about 125 tracts in the irrigated section of North Dakota out from Williston in what would be on the Buford-Trenton and in the Lewis and Clark Projects in North Dakota. I finished, under the direction of counsel here for [502] the defendant, the appraisal of approximately 2,389,000 acres of Indian land in Northern Idaho. I have put in considerable time in South Dakota during the past year during which I appraised probably in excess of 200,000 acres of farm and ranch land in that state, in addition to the various assignments that I have had over the State of Montana. I do work for the Montana Highway Commission, and I work in all parts of the state on that.

Q. And this is your exclusive business now?

A. That's right.

Q. Real estate appraisal work? A. Yes.

Q. You made an appraisal of the Kolstad properties involved in this action, the three separate parcels, at the request of the United States Attorney's office, did you not? A. Yes, I did.

Q. And would you state what you did in making your appraisal?

A. I first visited the property in early May of 1955 and put in a few days then going over the property. I got aerial photos of it and gave it a pretty good examination. Some of you may recall a

(Testimony of Henry Murray.)

heavy snow storm about that time. That drove me off the job. During the time I was off, I used the aerial photographs I had to make an overlay setting out all of the topography of the area, and when I went back [503] on the job, which I believe I didn't get back until August on this particular assignment, I took that map I had made into the field so that I could check the topography as I had obtained it from the aerial photographs against the actual conditions in the field. I found there were many features that could be misinterpreted in reading the aerial photographs, so I, with the map almost in hand, I covered the tract pretty thoroughly and mapped in the features that weren't revealed in the aerial photographs.

Q. Now, that was what you did on the place?

A. Yes.

Q. Did you do other work?

A. Yes, I had the opportunity of checking upwards of 100 sales in the area, some of them while I was engaged in this particular assignment, many others while I was involved in a right-of-way problem in the area. The work was so interwoven that the sales that were made for one purpose, inspection was good for the other, so that way I had the opportunity of personally examining practically every tract that had been sold for a period of, oh, through the latter part of '52, '53 and '54, and the early months of '55, or the first half of the year 1955, and talking to either the buyer or the seller,

(Testimony of Henry Murray.)

and in some cases, both buyer and seller in each of those transactions.

Q. And did you consider all of these sales that you examined? [504]

A. Yes, they were all part of the composite picture that I used to familiarize myself with the area and what the market was doing.

Q. Now, since the date of taking in this action, May 24, 1955, did you consider any sales, investigate any sales since that time?

A. Yes, I have, I believe I have checked about everything that has transpired during that time up to the present, up until mid-December, I would say.

Q. You have given consideration to those sales as well as the previous ones? A. Yes.

Q. What else did you do, or did you do anything else in connection with your work on these tracts?

A. Yes, my research took me into the soil phases and also into the production of the area.

Q. And what did you find?

A. Well, I found that the vicinity of these three properties that are involved in here was primarily a winter wheat belt, in fact, about the only winter wheat area of Liberty and Toole Counties. The Agricultural Statistician of the United States Department of Agriculture, cooperating with the Commissioner of Agriculture of the state put out a book every two years or so in which they compile all of the average production according to counties and to use. The area of [505] winter wheat of Liberty County and Toole County almost coincides with the

(Testimony of Henry Murray.)

area that we have here, because I learned that this was primarily the winter wheat region of those two counties.

Q. You mean winter wheat is not raised in any other areas in the two counties?

A. Practically none. This is the area that was referred to there, and I think the figures given would apply very closely to this particular area.

Q. Well, now, did you make any maps in connection with your work on these parcels?

A. Yes, I have already said that I made maps and classified the land right on the ground, that is, by a personal inspection of what I, as an appraiser, and also backed by the number of years of practical farm experience that I had, determined was the highest and best use of that land.

Q. Do you have that map in court here?

A. Yes, I do.

Q. And do you think you could better explain your opinion by the use of such map?

A. Yes, I do.

The Court: I hope you make more use of this map than of the other three you got in.

Mr. Galles: I apologize for that. I am sure we will use this map. [506]

Q. Now, we have had the map you referred to marked as Plaintiff's Exhibit 31. Would you state how you prepared it?

A. This is the Clarence Kolstad property. It is made from tracing the aerial photographs, in which the physical features, Willow Creek here, Eagle

(Testimony of Henry Murray.)

Creek up through here, Marias River down through here (indicating), were all shown, also the highway that goes across the property known as the Old Bootlegger Trail, and the marks, which I call hashering, shows the breaks and the hills, and about the steepness of them are indicated by the density of the hashering. The green indicates—I have made only three classifications. The green is the crop land, the yellow is the tillable land, and the orange, if you choose to call it that, and the red is the grazing land. The greater part of the good land had primarily or previously been cropped, but in going over it for the highest and best use, I did find areas which I thought that I, as a farmer, or another typical farmer, would probably cultivate, and so I have delineated those areas here by the difference between the two colors on here. There is more tillable land along the river. I have shown no irrigated land because I could find no water rights. I didn't regard alfalfa as the most profitable use of the area, when a man is equipped to raise wheat on a large scale, and so I have shown anything that I felt was tillable in the yellow, and that—that is, in red is what I took as probably [507] not suited for cultivation. This doesn't show too great an irregularity of topography, yet it is quite rough and cut up, and I didn't put in any tillable land in there.

Q. You are referring to two rectangular portions at the top?

A. Sections 30 and 31, Township 30 north, Range 4 east.

(Testimony of Henry Murray.)

Q. Now, as you have stated, I believe, you prepared this map from the information that you gathered yourself? A. Yes, that's right.

Q. I notice there are what you might call overlays? A. That's right.

Q. Explain what they are, please?

A. This is the entire Clarence Kolstad tract before taking.

Q. That is, with both overlays on the paper map?

A. Yes. I might explain down here in Section 26, you will see this diagonal line. Twenty-six should be over here another mile or so. I didn't want to extend the map over there. This 160 acres which lays four forties in a row has 20 acres of land in crop, about another 60 is suitable for cultivation, and the breaks are grazing land. This is what remains of the tract after the taking (indicating).

Q. Now, just a minute, we have taken the top overlay and thrown it on the back, so you have just the one overlay? A. Yes, on the base map.

Q. Now, go ahead.

A. We have the tracts of cultivated land here. I might [508] start up here in Section 31 where there is the southeast quarter of the southeast quarter, it is severed. It is primarily tillable land with some little waste land in it. In the northwest quarter of section 8, there remains 120 acres in an irregular tract. That is somewhat difficult to cultivate in that shape; that land in Section 9 is fairly irregular; that in 17 and 18 is not in too bad a

(Testimony of Henry Murray.)

shape. This isolated land over here in 10, the tract isn't affected, the value, however, is. On the south side of the river in what would be the southeast quarter of the southeast quarter, section 20, the southwest quarter of the southwest quarter of section 21, there is an isolated 80 acres. I should have called your attention to it before on the other one. The part in section 20, I took it as 35 acres of tillable land before because there were other areas in here that could also be tillable, but leaving this much only after the taking, I didn't feel that any typical operator would farm what he had left, so I put it all back into grazing after the taking. There is a possibility that I miscalculated on that. It adjoins the reservoir and possibly has some potential value as boat sites or for boating, which I didn't consider in my appraisal.

Q. I have had marked three sheets of paper stapled together, marked Plaintiff's Exhibit 32, and I ask you if you can state what that is, please?

A. This is a summary that I have prepared showing the breakdown of values by the several approaches that I have used. Page 1 covers the C. A. Kolstad property, page 2, the Alta Kolstad property, and page 3 is the joint ownership of C. A. and Alta Kolstad.

Q. All right, now, with reference to the C. A. Kolstad property, do you have an opinion of the fair market value as of May 24, 1955, before the taking?

A. Yes, I do have.

Q. Would you state what that is?

(Testimony of Henry Murray.)

A. That is \$335,664.

Q. Is that your opinion of the fair market value? A. By the summation approach.

Q. I want your final figure, if you would, please, what you think it is worth?

A. The summary that I have here, taking into consideration not only the summation approach, but the other approaches as well, and drawing my conclusions, \$290,000 before the taking.

Q. How did you arrive at that, Mr. Murray?

A. Well, I took the three accepted approaches to value and more or less folded them in together, weighed them out. To give you an example, I had 2397 acres of cultivated at \$100 an acre, 1231.77 acres of tillable at \$65 an acre, 1569.94 acres of grazing at \$10 an acre, and there was an old sheep shed and an old building which had some utility value as a [510] granary. They didn't represent much value, but I gave them a utility value of \$200. The total by the summation approach was \$335,664.

Q. Now, would you explain what the summation approach is so the jury can understand?

A. That is taking the various parts, breaking down a classification, taking the various parts at prices that are pretty well determined on the market for the various classes of land, taking the component parts of the land, taking them apart and putting a value on each.

Q. Why isn't that your opinion? I noticed your opinion is considerably less than that?

A. Well, I might say you buy your automobile

(Testimony of Henry Murray.)

as it is priced on the sales floor, and not through the parts department. We appraisers use the summation approach as the upper limit of value, that is, as a guide, as a check, but it generally represents the upper limit, just as with a car would, if you attempted to buy it by those various parts, you would find it would cost much more than the accepted market value, or accepted market price.

Q. You mentioned three approaches. Now, what is another?

A. Yes, my value as indicated by the earnings, that is, taking an average production of 20 bushels per acre, taking the part that can be attributed to the land, and capitalizing that out, I have a value of \$293,426. [511]

Q. Would you explain how that earnings approach works, how it worked in this case?

A. If I might get an example that I have already.

Q. Now, you are referring to some materials that you made yourself?

A. I have put it together, compiled it for the appraisal of this property. This is before the taking. I have a total of 2397 acres of cultivated land on this ownership. This is a summer fallowing country so we expect to have one-half of it in crop, 1198½ acres producing 20 bushels per acre, and that would be 1198.5 by 20 bushels, giving us 23,970 bushels total production. There is a little discrepancy in the share that is attributed to the land, and we usually take what custom dictates in the neighbor-

(Testimony of Henry Murray.)

hood. I found that this wheat land was generally leasing, sometimes on a quarter, sometimes on a third. I tried to find out which was which, and I thought that I could find where the better units, that is where there was considerable acreage of good land, the owner was in a position to get the higher share, so I figured that share of one-third to this land, 7,990 bushels.

Q. Why do you attribute only one-third to the land, what about the other two-thirds?

A. Well, theoretically, that is the cost of production, that is, if you would take the entire gross production and [512] deduct the farming operations, that is the cost of tillage, cost of seed, hired labor, everything that goes in, the various factors of production, you would come up with a certain figure, but in doing that, the more efficient operator would be pretty well selling his services along with his land, and we like to be impartial in this, and take what is most typical, and in that way, we iron out the difference between poor operators and highly efficient ones, and feel that by doing that, we are putting a value on the land and not evaluating the operator.

Q. Very well, would you proceed, then?

A. Well, on this tillable land—by tillable, I mean the land in orange on the map and that has not been previously broken, but is susceptible of cultivation, and taking that one-half in crop, 1231.77 acres, one-half in crop makes 615.83 acres, and I have figured that at an average production of 18 bushels. The

(Testimony of Henry Murray.)

reason for that is that I think the better land generally has been already placed in production, and the land that is left is not quite so good, and my experience would indicate that on those smaller tracts that it is not quite as easy to farm and there is more expense, and so I figured that at 18 bushels average, so we have 613.83 acres at 18 bushels which gives us 11,085 bushels. In this case, with these small irregular tracts, I have taken one-fourth as the landlord's share, making 2771 bushels. Now, we [513] have the production from the cultivated land, 7990, plus the 2771, equals 10761, which taken at a market price that I determined of \$2.25 per bushel, and that would include a premium for protein, making a gross return from the wheat production of \$24,010. Well, we have 1569.94 acres of grazing——

Mr. Wiggenghorn: What is that figure again, please?

A. 1569.94 acres of grazing, and that is quite widely scattered as you will see from the map. There is none of it could be considered a year around operation in my judgment. A greater return can be made by cropping that portion that is tillable and even regarding the rest as more or less waste land. However, when the crop is off on the fall, there might be a chance to use it, and I have given it a nominal return of 15 cents per acre, which is the basis on which Mr. Kolstad rented it previously, making \$235.49 return from the grazing, or a gross return to the land of \$24,245.49. I have estimated the taxes on that at \$771. There is no buildings to

(Testimony of Henry Murray.)

insure or maintain, so that we come down to the pure rental there, or the net imputable to the land, \$23,474.09, capitalized at eight per cent gives a value of \$293,426, by the earnings, capitalization of the earnings.

Q. That is the figure you have on Exhibit 32 as far as the C. A. Kolstad property is concerned?

A. Yes, that is right. [514]

Q. Now, the third method or approach you made is what?

A. Is the value as indicated by the market data.

Q. What is that?

A. You will notice above by the summation approach my average value per acre is \$64.56. The sales that I have examined in the area, considering the amount of tillable land, the amount of cultivated land, the amount of grazing land involved, I couldn't find where there was anything that would justify a higher figure of \$64.50, and my findings would indicate that I could substantiate \$55 as the market price according to other sales in the area, and that made approximately \$290,000. Anyway, it is rounded to \$290,000.

Q. Now, do you have an opinion of the fair market value of the C. A. Kolstad holdings as of May 24, 1955, after the taking?

A. Yes, I do. The fair market value in my opinion after the taking is \$63,000.

Q. And did you check that by the other approaches?

A. Yes, that is checked by the summation ap-

(Testimony of Henry Murray.)

proach. The land, the 837 acres of cultivated land remaining was reduced in value by \$15, the grazing—pardon me, the tillable land, 172 acres, was reduced to \$40, which is a reduction of \$25, the 391 acres of grazing remaining remains the same. It wasn't too desirable before, and I felt that it was not hurt to any appreciable extent after the taking, so it remains the same. [515]

Q. Then, the average price per acre on the remaining tract as you have determined it is what?

A. By the market approach, \$45.

Q. And what is the difference between the before valuation and the after valuation of the C. A. Kolstad property?

A. My value before, \$290,000, the value after, \$63,000 or a difference of \$227,000.

Q. Now, with reference to the Alta Kolstad property, did you prepare a similar map on that tract?

A. Yes, I did.

The Court: Are you going—you had better mark these overlays you are using separately.

The Witness: The base should be marked, I think, and then each overlay.

Q. You prepared this overlay, being Plaintiff's Exhibit 34, Mr. Murray? A. Yes, I did.

Q. In the same manner as you prepared Exhibit 32?

A. Yes, I used the one base with transparent overlays.

Q. And the classifications you have given, the three classifications, the colors are the same as in the previous? A. Yes, that's right.

(Testimony of Henry Murray.)

Q. What is green?

A. Green is cultivated, orange or yellow is the land that is susceptible of cultivation, called tillable land, and the [516] red is the grazing land.

Q. Very well.

A. I wanted to point out here, if I may, that the difference between the previous map and mine is the fact that these areas in here could not be determined with accuracy from the aerial photograph, and that is where I checked it in the field, and represents my opinion of the land that can be cultivated with fairly regular turns. Not every hip and so on that might be plowed is shown there, but the practical aspect of the shape of the farm for modern equipment.

Q. When you said the previous map, Mr. Holbrook, or Mr. Murray, you were referring to Exhibit No. 7? A. 7.

Q. Yes, and in particular, as an example, would you show us what you mean by the shape of the field you have as tillable?

A. Well, for instance, in Section 20 of the Alta Kolstad property, I don't believe a typical farmer with modern day equipment would take these little narrow, slim places down there, I don't believe they would ever turn around the creek or irregularities here, assuming this is tillable land here that they would make a certain degree of uniformity along there, trying to make the field as regular as they could (indicating).

(Testimony of Henry Murray.)

Q. That is what you have done in your exhibit? [517]

A. That is what I have tried to do here, yes. The map that I am turning over now has represented the entire tract before taking.

Q. That is the first overlay on Exhibit No. 34?

A. Yes. The area that remains shows that where we did have some pretty good fields along here in Sections 33 and 29, there are just little parcels here. That raises the question as to their future use at all. This tract here in 31 has been completely isolated by the water backing up the Willow Creek. Over here to the extreme right hand side, which would be in Section 35, there is a forty on the east side of Eagle Creek which is grazing land. It was grazing land before. I have depreciated its value as grazing land, and yet, at the same time, I question whether it might not have an enhanced value as a boating site upon the development of the lake.

Q. All right, would you take the stand again, please? Now, do you have an opinion and a conclusion of the fair market value of the Alta Kolstad property as of May 24, 1955, before the taking in this action?

A. Yes, I do.

Q. State what that is?

A. That value is \$189,600.

Q. How did you arrive at that?

A. That is the folding in, as I have indicated before, of [518] the three approaches to value, finally coming up with a market value by the market approach and using the others as a check. I have

(Testimony of Henry Murray.)

under the summation approach, 1725 acres of cultivated land, and I don't regard this cultivated land as the equal of the Clarence Kolstad property, it isn't in the large fields, generally speaking, the soil is not quite equal to it, and I have shown a value of \$85 per acre. There is 136 acres of cultivated which is a later field to be broken out, and if I might point that out, this area in Section 33 on the section line between 33 and 32, and also the east half of the southwest quarter of Section 33 is a more recent breaking, it is an irregular field, somewhat hilly, and I have given that a little less value, \$65 an acre. I have 630.95 acres of tillable which is shown in the orange there at \$50 per acre; 2247.92 acres of grazing at \$10 an acre, and on this tract of land, there is what was referred to as the Sailor buildings which have been previously described here. I attributed a value of \$6,430 to the improvements on the property, making a total by the summation approach of \$215,973, or an average value of \$45 per acre. The earnings approach, the capitalization of earnings, as I have indicated before, I have gone through the process, that would show a value of \$154,353. That probably is quite a spread between the summation approach, but I will call your attention to the fact that there is a lot of land there in grazing land, all grazing, that is not [519] producing very heavily, so your earnings approach is down somewhat; and the market approach, where previously I had \$45 by the summation method, the market would indicate an overall average value for

(Testimony of Henry Murray.)

your grazing, your tillable and farm land of \$40 per acre, or a fair market value according to my estimate of \$189,600.

Q. And after the taking for the lands remaining, do you have an opinion of the fair market value as of May 24, 1955?

A. Yes, my estimate after the taking of the fair market value is \$100,000.

Q. Was there any reduction in value because of the taking that the remaining land suffered?

A. Yes, where previously I had had a value of \$85 on the cultivated land, the bulk of the remainder took a value of \$65, with the isolated tract in Section 31, which is severed by the water backing up in Willow Creek, I reduced that further to \$60. The tillable land is practically the same as it was before, and I left the value the same. The grazing I left the same, except the 40 acres to the extreme right in Section 35, which I reduced from \$10 to \$5, so that my valuation by the summation approach after the taking was \$114,819, or an average value of \$40 per acre. The value estimated by the earnings, capitalization of earnings was \$109,968. By the market data approach at an average value of \$35 per acre after the taking, the value was \$100,000. [520]

Q. And the difference between those?

A. So my summary, before \$189,600, after, \$100,000, the difference being \$89,600.

Q. Now, with reference to the joint property, Mr. Murray, do you have a similar exhibit that you prepared?

A. Yes.

(Testimony of Henry Murray.)

The Court: I wonder if I might ask a question about the summary you have on the Alta Kolstad property. You have "After taking" and you have a list of figures, and a sum of 2868.59 acres.

A. Yes.

The Court: In your list of figures, I don't understand——

A. That is a little bit confusing. You will notice I have shown 1154 as cultivated, but haven't extended any value per acre because there is a breakdown there of two different values, 799 acres of cultivated at \$65, and 355 acres of cultivated at \$60, which takes care of two classes of cultivated land, and the same thing applies to the——

The Court: Grazing?

A. ——grazing acres.

The Court: Very well, proceed.

Q. (By Mr. Galles): The exhibit has been marked as Plaintiff's Exhibit 35, and would you state what that is, Mr. Murray?

A. That is the map of the ownership, of the joint ownership [521] of C. A. and Alta Kolstad. The colors are the same as on the previous maps, this land along here, the bottom land along the Marias here being alfalfa fields, but getting no special consideration because of that. On a wheat operation, it is difficult to find that a couple hundred acres of non-irrigated alfalfa takes any particular significance, and I have classed that as tillable land, as I have the various bottoms along here. I realize that there are brush and trees on some of them, and yet the

(Testimony of Henry Murray.)

soil is particularly good, and I felt that by making the differential in the price between the cultivated land and the tillable land reflect the cost of clearing and cultivation that we could arrive at the price in that manner. The topography as indicated here in the overlays shows the breaks. By having the topography in, you see why there is this irregularity. For instance, these spots I am referring to are a couple of small buttes in Section 3, and one in the southwest quarter of the southwest quarter of 2. They are non-tillable, just rocky buttes, and they take up little area, but having it this way shows why they have been colored and taken out.

Q. This exhibit consists of two transparent overlays colored and is used in connection with the base map exhibit previously identified, is that right?

A. Yes. We are now looking at the remainder, which is on the two sides of the Marias River, separated by the reservoir, [522] leaving the greatest area of cultivated land on the south side of the river, which can be enlarged only by about 60 acres of tillable land. The major part of the land on the north side is rough grazing land. I believe there is a matter of 19.6 acres, as I recall, already cultivated on the north side, which are these two tracts in Section 2 and another tract in Section 7—Section 2, Township 30 North, Range 3 East, and Section 7, Township 30 North, Range 4 East. Again, I have not tried to get every square foot I could of tillable land, but considered it as I think a typical farmer or operator would from the size of the equipment,

(Testimony of Henry Murray.)

using the long sweeping curves here, and you will notice here in the Northwest quarter of 9 and the south half of the southwest quarter of 4 that I have indicated tillable land right across a gully or draw there because the slopes are not too precipitous, and it can be, I think cultivated.

Q. This exhibit was prepared from the same information that you prepared the other exhibits, gathered by you on the property itself?

A. That's right.

Q. Do you have an opinion of the fair market value as of May 24, 1955, of the jointly held property before the taking? A. Yes, I have.

Q. Will you state what that is, please? [523]

A. \$335,700.

Q. How did you arrive at that?

A. To give you the summation approach, 1,774 acres of cultivated at \$90. Again, this land is not as good as the Clarence Kolstad cultivated land. It is a lighter soil and somewhat inclined to blow, but it is in a pretty good sized regular shaped tract. 2,276.41 acres of tillable at \$65 per acre; 3,409.67 acres of grazing at \$10. There was quite an extensive set of improvements on this, which is the Turner place. On the bottom not far from what is known as the Turner Bridge, a large barn with quite a substantial addition to it. It had at one time, I assume, been a dairy barn, very well built, standing in good shape, a good hog house, a good poultry house, a usable granary, an oil house, I would say for fuel and oil, and an old bunk-house that had very little value. At another location which would be on the Section line between Sections

(Testimony of Henry Murray.)

15 and 22, there was an older set of buildings with a large sheep shed of "L" shape, an old house that was beyond repair, a couple of granaries, storage houses, and I didn't attribute a great deal of value to them, and yet I felt that they had some utility value, and my value for the improvements at these two sites on the property was \$15,610. My valuation by the summation approach, then, was \$357,333, or an average of 47.90 per acre. My value as indicated by the earnings approach was \$288,900, and the value as indicated by a market of \$45 per [524] acre average was \$335,700, and I accepted the market approach as the fair market value, or the value before the taking.

Q. And that is a higher value than the value indicated by earnings? A. Yes.

Q. But lower than the value by your summation approach?

A. Yes, that's right. You see there is not a great deal of producing land on that, so the earnings is somewhat lower, the earnings approach.

Q. Now, after the taking, would you state what your opinion is of the value of the lands, market value of the lands remaining in the joint ownership as of May 24, 1955?

A. The value after the taking, \$156,600, making a difference of value for the taking of \$179,100.

Q. How did you arrive at your after-taking value?

A. The summation approach, 1,243 acres of cultivated on that tract—that is further broken down to 136 acres of cultivated that is north of the river, those three isolated tracts at \$65; 1,107 acres that I

(Testimony of Henry Murray.)

have on the south side at \$90; 984 acres of tillable at \$50; 1,687.17 acres of grazing at \$10, making a total by the summation approach of \$174,542, an average of \$44.59 per acre by that approach. My earnings approach indicated because there is a little bit more farm land here in proportion, \$175,803, and the [525] market data on an average value of \$40 per acre, \$156,600, so that was accepted as the fair market value after the taking, making a difference, as I have indicated of \$179,100.

The Court: What do you mean by market data?

A. That is the information of the sales that have been made in the area.

The Court: It is just information with respect to sales?

A. Yes.

The Court: In your opinion, is that what the market value is?

A. Yes.

The Court: And then it is your further opinion that the higher values of this land as viewed by the different approaches are not reflected by the market value?

A. Yes, the summation approach usually indicates a higher value.

The Court: I don't mean usually, I mean in this instance we are talking about. We are talking about this land located where it is. We are not talking about usual matters, we are talking about this land.

A. Yes, well, it happens——

The Court: Then I then ask you again, it is your

(Testimony of Henry Murray.)

opinion that the market value of this land doesn't reflect its higher value from other approaches?

A. That's right. [526]

The Court: And why?

A. Well, I think that can be explained as I have indicated before, that the total cost of a car assembled is not the same as if you would buy it through the parts department and assemble it. The summation approach is a check on value and would represent the upper limits.

The Court: Can you think of an example where the sum of the parts do reflect its true value?

A. No, I can't.

The Court: Go ahead, I am not going to take over the examination, I am just curious about this whole thing. We are getting to about that point where I suggested to the jury we are going to leave just a little early as we started a little early, so I think that maybe we had better do that now. (Jury admonished.) Court will stand in recess until Monday morning at 10 o'clock.

(Thereupon, a recess was taken until 10 o'clock a.m., Monday, January 21, 1957, at which time the following proceedings were had:)

Q. (By Mr. Galles): Mr. Murray, I noticed in your summary that your conclusion of the fair market value on the Clarence Kolstad tract, for example, is somewhat less than the figure you arrived at by what you call the summation approach. I

(Testimony of Henry Murray.)

wonder if you would explain why your conclusion is somewhat less than that figure? [527]

A. Yes. As an appraiser, we explore the value by three different approaches, and the summation is the component parts evaluated, and that is one approach. Sometimes, if there is an inactive market, it might be necessary to rely rather heavily upon that where there aren't a number of sales. Where the earnings approach can be as readily determined as it can on a wheat farming enterprise, we also use that approach, and we then take the three approaches and rely most heavily upon the market information as the amount that a willing seller and a willing buyer would come to.

Q. Now, you talk about market value, and that is what everybody is talking about here. What does determine market value?

A. It is what the willing seller and the willing buyer will negotiate at. The buyer may break down the prospective purchase as we have done here, so many acres of cultivated land, so many acres of tillable, so many of grazing, put an approximate value on the improvements, and that would represent his thinking. The seller probably would be some other place, but it is a basis of negotiation, and the market is not what we arrive at by this approach, but what we can conclude that the willing seller and willing buyer will finally consummate the deal at, as evidenced by sales in the market place. [528]

Q. What does a buyer, in your opinion and in your experience, take into consideration in arriving

(Testimony of Henry Murray.)

at what he is willing to pay for a given piece of property?

A. Well, among the things that are considered in addition to the location factor, are the soil types, and also the size and shape of the fields have a great deal to do with it. You will notice in the Clarence Kolstad tract that we are talking about now that his fields are larger, more regular in shape, and I have given that a higher value than I have, for instance, on the Alta Kolstad, where there are no regularly shaped fields, they are irregular, the cost of operation is more. Those things, again from an appraisal standpoint, and from my experience as a broker, are considered by the prospective buyer.

Mr. Galles: Your Honor, we offer in evidence the exhibits identified by this witness, being Plaintiff's Exhibits 31, 32, 33, 34 and 35. They constitute his summary sheets as well as the base map and the three overlays that were marked and identified.

Mr. Wiggenhorn: No objection.

The Court: Very well, they are admitted.

(Plaintiff's Exhibits 31, 32, 33, 34 and 35, being the summary sheets, map and overlays above referred to, were here received in evidence.)

Mr. Galles: You may examine. [529]

Cross-Examination

By Mr. Wiggenhorn:

Q. Mr. Murray, I may have missed it, but did you tell us when you first examined these lands, the three units?

(Testimony of Henry Murray.)

A. I believe I mentioned I was on the land early in May of 1955, and I think I recall that there was a snow storm that compelled me to leave the job at that time. I returned to complete this assignment in August of 1955, but in the meantime, I had been here on another assignment in the same area and was able to make a good many market checks at that time.

Q. And when were you first employed by the Bureau of Reclamation?

A. I never was employed by the Bureau of Reclamation.

Q. I am sorry, I withdraw that. When were you first employed by the Justice Department?

A. Probably in April. Anyway, it wasn't very long after I received the notice that I was on the job here.

Q. Of 1955? A. 1955, yes.

Q. Now, you said that you could find no water rights with respect to any of these parcels. Where did you look for them?

A. I submitted that question to the United States Attorney, whether there was any involved; not being an attorney myself, [530] I have to rely upon legal counsel as to whether those things are to be considered, and I was advised by counsel that, as I understood it, there were no water rights. At least, that is the basis I proceeded upon.

Q. In other words, really what you were trying to ascertain was whether in your evaluation of these lands, you had to consider in addition to the lands themselves whether they were irrigated or not?

(Testimony of Henry Murray.)

A. That's right.

Q. But you didn't mean to say then you made a search of some sort to find out whether there were any water rights?

A. No, I didn't rely upon my own knowledge as to whether there were valid water rights.

Q. You do not pretend to say now, do you, that none of these defendants had any water rights?

A. I couldn't say that.

Q. It is merely a matter of whether or not you were to, in considering value, whether—

A. There was no evidence of irrigation at that time.

Q. Let me finish the question so you will have it all. I was asking you all you did was to be very sure that in valuing the property, you were not to consider it as irrigated land?

A. That's right.

Q. Now, in referring to Exhibit 32, which is your memorandum [531] tabulation of the methods by which you arrived at the values for each of these places, I notice at the very outset that you set forth in the first tabulation the number of acres of the different classifications, cultivated land, tillable acres, grazing acres, and so on, and after each one you have assigned a price on it. For instance, in the cultivated acres in the case of Clarence Kolstad you have \$100. I suppose that is \$100 per acre?

A. That's right.

Q. How did you arrive at that figure of \$100?

A. By two methods. One of them is a comparison of what cultivated lands were selling for in the area.

(Testimony of Henry Murray.)

I could find nothing that would exceed \$100 per acre; and another is to take a single acre of land—I might say that there are many sales made in that area of cultivated land at lower prices. In fact, there seemed to be two groups of sales, that is, they might be 40 to 60 dollars an acre, and there is another group that is higher, up to \$100. To satisfy myself from the earnings as to which group I could place more reliability on, I capitalized the earnings from a single acre, such as the 20 bushels I mentioned at \$2.25 a bushel, and taking the landlord's share as the amount imputable to the land, and that indicated to me that the earnings would approximate the upper brackets, that is, those sales in the \$100 or less bracket, more closely than it would [532] the group in the 40, 50 or 60 dollar bracket; so I took the market and then checked by the capitalization of income or earnings.

Q. That is another way of saying, is it not, Mr. Murray, that in arriving at the figure for cultivated land, you first of all took the market approach and then tested it by the income or capitalization approach?

A. Yes, that is for the component parts.

Mr. Wiggenhorn: No further cross-examination.

Mr. Galles: That is all.

(Witness excused.)

Mr. Galles: The government rests, your Honor.

The Court: Any rebuttal?

Mr. Wiggenhorn: We have no rebuttal.

The Court: Well, I think, probably what we had

better do, the Court has to have a conference with counsel, it might be better to recess until one o'clock and then we can have the arguments and instructions of the Court. (Jury admonished.)

(Thereupon, a recess was taken until 1:00 o'clock p.m. of said day, January 21, 1957, at which time Mr. Wiggenghorn opened the arguments to the jury on behalf of defendants, Mr. O'Connell and Mr. Galles argued the case on behalf of plaintiff, and Mr. Wiggenghorn closed the arguments on behalf of defendant, following which a 10 minute recess was taken, and then the following proceedings were had:) [533]

Mr. Schiltz: Defendants offer Defendants' Exhibits 36 and 37, being a summation or summary of the figures of Mr. Holbrook and Mr. Carrothers, respectively.

The Court: Any objection?

Mr. Galles: No objection.

The Court: Very well, they are admitted.

(Defendants' Exhibits 36 and 37, being the summaries above referred to, were here received in evidence.)

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, as from your previous experience now, you know this is the time when the Court instructs you as to the law of the case, you having heard the evidence in the case and the arguments of counsel. As you no doubt understand, you are instructed that the argu-

ment of counsel doesn't constitute any evidence in the case. I think counsel themselves explained that to you that their purpose, by their arguments and statements, is to assist you in analyzing the evidence that has been presented to you so that you can, under the evidence and the law, as I give it to you, arrive at a just verdict. These cases, for what we have here is in truth three separate cases, are what are known as condemnation cases. Under the Constitution of the United States, the Government is entitled to, for a public use, take the land of private owners, but the Constitution also provides that when the Government does that, it must pay the owner just compensation. [534]

Now, in this case, the land was taken by the Government, on May 24, 1955, and it has already been determined that it was taken by the Government for a public use, so we are not concerned with that in the case, but we are concerned with the question of what the landowner is to receive as a result of the taking of the land by the Government. In other words, we have to determine what is just compensation to each of the owners here involved in each of the three cases, that is, we have the case of Clarence Kolstad with reference to his land, and we have the case of Alta Kolstad, with reference to her land, and then we have the case of the lands of Clarence and Alta, which are owned jointly by them. You will consider each of those cases separately, and arrive at your verdict as to each of them separately. As I say, you are instructed that, under its power of eminent domain, the plaintiff in this case, that is the United

States of America, has taken the respective parcels of lands of the defendants, Clarence A. Kolstad and Alta A. Kolstad, comprising three separate parcels, as follows: 3,798.71 acres taken from Clarence A. Kolstad; 1,871.28 acres taken from Alta A. Kolstad; and 3,570.06 acres taken from Clarence A. Kolstad and Alta A. Kolstad, jointly. Said lands were taken from the defendants on May 24, 1955, and it is your duty in this case to determine from the evidence the just compensation to be paid to each of said defendants, because of the taking of his [535] or her property.

Now, just compensation means the payment of such a sum of money to the defendants as will make them whole, so that upon receipt by them of the compensation, they will not be any poorer or richer by reason of their property having been taken, and so that they will be in as good a position in money equivalent, moneywise, at the time of taking, as they would have occupied if their property had not been taken. Just compensation means the fair market value of the land at the date of taking. This does not mean the price which the property will sell for under special or extraordinary circumstances, such as a forced sale, but such price as would be reasonably arrived at in dealings between a willing seller and a willing buyer, where the seller was under no compulsion to sell, and the buyer was under no compulsion to buy. You should consider all of those matters and things, which a prudent and reasonable buyer and seller would naturally consider, discuss and take into consideration in the event of a sale of property.

You are charged, that if you find at the time of the taking, there was a free and open market for the sale of real estate, such as the Government has taken in these proceedings, then each of the defendants, as a landowner, is entitled to recover the fair market value of his lands at such time, notwithstanding that such fair market value might have been higher at the time of taking, [536] than at any other time prior thereto. The Government chose to take this land in May, on May 24, 1955, and so it must be held to the market value as of that time. The fact that you may find the prices at that time were higher as compared with other times prior to the taking, should not deter you from fixing the fair market value in your verdict as of that precise time, and if you find, with respect to any one of the defendants, that the land taken was a part of a larger tract, then you must determine whether, by the taking of said lands, the remaining lands of said defendant were damaged or depreciated in value. In such case, the compensation to which each defendant is entitled to is the difference between the fair market value of the entire tract before the taking, and the fair market value of the part of the tract remaining after the taking, and you should so determine the compensation to which each defendant is entitled in your verdict. Every fact concerning the property which a buyer and seller would be disposed to consider, should be given consideration by you in arriving at your verdict, including the size, and location, and terrain of the property, of the land, production, net earnings, and every other item that you find a buyer and seller

would consider in arriving at a determination of a purchase price.

Now, those are the considerations which you have to devote your attention to. You have to determine what just [537] compensation is in each of these cases, and that is determined by what the market value of the lands were on the date of taking, and so you take each case separately; take the value of the whole tract, each separate tract, determine the market value, the fair market value of that whole tract at the time of taking, and then consider the fair market value of the remaining portion after the taking, and the difference between the before taking value and the after taking value, is what the law considers to be just compensation, and when you arrive at that figure, then you have arrived at a verdict with reference to that land, and that owner. As I say, those are the considerations which you have to devote your attention to, and deciding these matters, and in viewing them, you are advised that as jurors you are the sole judges of the credibility of the witnesses, and the weight their testimony deserves. Now a witness, in the first place, is presumed to speak the truth, but this presumption of speaking the truth may be outweighed by the manner in which a witness testifies, or by the character of the testimony that he gives, or by contradictory evidence and testimony. You should carefully scrutinize the testimony given, the circumstances under which each witness testifies, and every matter in evidence, which tends to indicate, whether or not a witness is worthy of your belief. Consider each witness' intelligence,

his motive, his state of mind, [538] his manner and demeanor while on the stand; consider also any relationship that each witness may bear to either side of the case; the manner in which each witness may be affected by the verdict, and the extent to which, if any at all, each witness is either supported or contradicted by other evidence in the case. Now, of course, the inconsistencies and discrepancies in the testimony of witnesses, or between the testimony of different witnesses, may or may not cause you, as the jury, to discredit such testimony. In weighing the effect of discrepancies, consider whether they pertain to matters of importance or unimportant details, and whether the discrepancies result from innocent error or wilful falsehood. If you find, with reference to any witness, that the presumption of truthfulness is outweighed, you will give the testimony of that witness just such credibility, if any, as you may think it deserves. As I told you before, the argument of counsel is not testimony in the case. It is designed, and its purpose is, to assist the jury in analyzing the evidence in the case as presented to you in the light of the instructions of the Court as to the law. So the purpose is to help you, and you should give the arguments of counsel no consideration as evidence in the case at all, but merely use it as it may assist you in analyzing the evidence and weighing it, and arriving at your verdict under these instructions of the Court. The evidence in the [539] case consists of the sworn testimony of witnesses, and the exhibits which have been received in evidence, and all other facts which may have been

admitted. Any evidence to which an objection was sustained by the Court, or any evidence ordered stricken by the Court must be entirely disregarded by you. You are to consider only the evidence in the case, but in your consideration of the evidence, you are not limited to the bald statement of the witnesses, but on the contrary, you are permitted to draw from facts, which you find to have been proved, such inferences as seem justified in the light of your experience. Such an inference is a deduction or conclusion which the reason of the jury, and common sense, lead the jury to draw from facts that have been proven.

Now, you are further instructed that you are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number of witnesses, or other evidence, which does produce conviction in your mind. So you see, the testimony is not judged by which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witnesses and which evidence appeals to your minds as being most accurate and otherwise trustworthy as weighed in the light of these instructions.

Now, as evidence of fair market value, there was presented [540] in this case, by both the Government and the landowners, two kinds of testimony. First, there was the testimony of expert witnesses as to their opinion of the market value of the land. Now, while the rules of evidence do not ordinarily permit

a witness to testify as to his opinion, an exception is made in the case of experts, who, by reason of training, education and experience, are able to give a considered judgment as to the existence of a fact. It is for you to determine what, if any weight to give the testimony of any such expert who has testified here, and you may reject the testimony of an expert, if you conclude that the reasons given by him in support of his opinion are not sound. In this connection, there was testimony of each of the experts relating to sales in the general market area of the lands taken. This was admitted as a part of the basis and reason upon which the experts base their opinion. I instruct you, as I instructed you during the trial, you are to consider that testimony only for that purpose.

Now, in addition to the testimony of the experts as such, there was also admitted direct testimony and evidence of particular sales. I believe, as I recall it, in these cases one sale was offered by the Government, and one sale by the landowners. These sales may be considered by you as independent proof of the fair market value of the land here involved, if you find, from a preponderance of [541] the evidence, that such sales, or any of them, were of lands comparable to the lands here involved. It is for you to determine whether the sales are comparable, and whether they do establish a fair market value as of the date of taking here, which is May 24, 1955.

You are further instructed, that in determining the fair market value of lands here involved, you are not limited to a consideration of the uses to

which the landowner put his land, but on the contrary, the landowner is entitled to just compensation based on the fair market value of the land, considered in the light of the highest and best use to which the land was, or might reasonably be put, in the reasonably near future, to the date of taking, which was May 24, 1955.

Now, during the trial, the question was asked Mr. Kolstad whether he had a water right, to which he answered that he did not. In this connection, you are instructed that there is no evidence that he had an adjudicated water right, but you are further instructed that every landowner has a right to the use of water of a stream or river, not otherwise being used by one with a prior right.

During the course of the trial, I occasionally asked witnesses some questions. I did that in order to bring out facts, which I thought then not fully covered in the testimony. You are instructed, that you are not to assume that I hold any opinion on the matters to which my questions related. [542] Remember at all times that you are the jurors, and as the jurors, you are at liberty to disregard all comment of the Court in arriving at your findings as to the facts here. You are just bound to follow the Court's instructions as to the law. The law does permit a Federal Judge to comment to the jury on the evidence, and to make such comment as, for example, the lawyers make in their arguments of the case, but even though the law permits that, if the Court did make comments, the comments of the Court would be directed just to the same purpose

that the argument of counsel is, that is, it would merely be to assist you, and you would not be bound by anything the Court said in its comments, but further, and over, and above all that, I have no desire to influence you in any way in arriving at your decision and your verdict in these cases.

The cases are not complicated. There are, of course, a mass of figures that have been submitted to you, but we have obviated any difficulty in that connection by submitting to you, and you can take to your jury room with you, the summaries of those figures so you will have the testimony of each of those expert witnesses and the testimony of Mr. Kolstad, the landowner, with reference to all of those figures, and so the matter is not going to be complicated for you so far as those things are concerned, and so I can see no necessity for me to comment to you on the evidence. [543] The issues are clear. It is a simple issue, just compensation. How is just compensation determined? By the fair market value of the lands before the taking, and taking the fair market value after the taking, subtract the difference and there is your answer. That is a simple problem for the jury, and so there is nothing for me to help you with so far as I can see. In any event, from anything that I have said, or any questions that I may have asked, or any rulings that I may have made in the course of the trial, don't, in arriving at your decision, give any consideration to what you may think my opinion is in the matter. If my opinion were of any real value, I would be trying the case without you as jurors, but you are the

jurors and the judges of the facts, and that is your responsibility, and you have to exercise it. As I say, you have the power here, a great power, but with that power goes a deep responsibility, and I don't want to interfere with the exercise of your duties in connection with those responsibilities.

I might say to you, that the lands involved here are apparently of considerable size, and from the figures involved, the just compensation, whatever it may be, is a considerable amount. You are not to consider, however, that the landowner is going to receive a large sum of money, and that the amount that does constitute just compensation is a large sum, because he, as the landowner, and she, as [544] the landowner, and both of them together jointly, are entitled to that. It is their land, and be it large or small, they are entitled to it. On the other hand, both parties, the Government and the landowners, come before this Court, and before you as Officers of the Court, as equals, and you will only arrive at a just verdict if you arrive at a true verdict. If, by any chance, you should consider that the landowner is getting a lot of money, you would not be fair to him. On the other hand, if you should consider that it is costing the Government a lot of money, you would not be fair to him or to the Government, and so, arrive at your verdict from the evidence in the case, and without regard to the consequences of it.

Now, your verdict must represent the considered judgment of each juror in order to return a verdict. That is, each juror must agree to the verdict. In other words, your verdict must be unanimous, and it

is your duty, as jurors, to consult with one another, and to deliberate with a view of reaching an agreement, if you can do so without violence to your own individual judgment. You see, each of you must decide the case for yourself, but do that only after an impartial consideration of all of the evidence with your fellow jurors, and in the course of your deliberations, don't hesitate to re-examine your own views and change your opinion, if your honest conviction, as to the weight of evidence, is [545] changed and you find that your original stand was erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. As I say, the verdict must be yours, each of yours, each one of you must arrive at the verdict, and in that connection, you are instructed that you are not permitted to return a verdict which is known as a quotient verdict. In other words, after you get into the jury room, if there are any differences between you as to what the verdict should be, don't decide just to add up all of those and divide by the number of jurors, and return that as your verdict, or don't take the list of all of the expert witnesses and just add them all up and divide it by a number, and return that as your verdict. That kind of a verdict would be what is known as a quotient verdict, and it would be an illegal verdict, and would not be a proper verdict. As I pointed out to you, the verdict must be the judgment of each of you arrived at as a result of your

deliberations and viewing all of the evidence under these instructions.

When you go into the jury room, you will select one of your number to act as foreman, and the foreman will preside over your sessions and your deliberations, and he will be your spokesman in court. If it is necessary for you, in the course of your deliberations, to ask the Court any [546] questions, just notify me through the Bailiff that you want to ask me a question, and we will come up into court and you can ask me the question, and I will answer it if it is a proper question to be answered. In that connection, I may say to you, if you have any questions with reference just to the evidence itself, there is no sense in asking me any questions, because you are the judges of the facts, and I can't tell you what the facts are, and I don't pretend to.

There will be submitted to you all of the exhibits, which you will take to your jury room with you, and do you have the forms of verdict, or do I have them? You will take with you to your jury room three forms of verdict, one for each of the cases here. One of the verdicts, eliminating the title of the Court and cause is: "We, the jury, duly impaneled and sworn in this cause, hereby award the defendant, Alta A. Kolstad, as just compensation in this cause, the sum of blank," and then a place to write in the figure, and then a place to write in the numbers for the taking of her land, and then a place for the foreman to sign his name, and the same form of verdict is submitted to you with reference to

Clarence A. Kolstad, and with reference to the joint lands of Clarence A. and Alta A. Kolstad.

When you arrive at a verdict in these cases, and each of them, the foreman will then sign the verdict, and you will then return into court with them. [547]

Remember at all times in your deliberations in the court, you are not partisans in the case. You are judges of the facts, you are Officers of the Court, and your sole interest is the ascertainment of the truth, the determination of a fair and impartial verdict, and I am sure that you will discharge those duties in the light of your oath, and make a worthwhile contribution to the administration of our system of doing justice through the Courts by arriving at an impartial verdict here. Are there any objections to the instructions of the Court?

Mr. Galles: No objection.

Mr. Schiltz: No objection.

The Court: Very well, the Bailiffs have been sworn, and you will retire to the jury room and commence your deliberations, select your foreman, and commence your deliberations. Court will stand in recess awaiting your return. [548]

Certificate

In the United States District Court, District of
Montana, Havre Division

I, John J. Parker, certify that I am the Official Court Reporter of the above-entitled Court, and that as such I attended the trial of Cause No. 1726, United States vs. 11,211.45 acres of land, Clarence

A. Kolstad, et al., tried before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting with a jury at Havre, Montana, commencing on the 12th day of December, 1956, and reported in shorthand all of the proceedings had at said trial; that I thereafter transcribed said shorthand and prepared the foregoing transcript, which is a full, true and correct transcript of the proceedings had at said trial.

Dated at Butte, Montana, this 10th day of June, 1957.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the papers hereto annexed, to wit: Complaint; Order for Delivery of Possession; Notice of Condemnation; Appearance by Defendant; Deficiency Judgment; Notice of Appeal filed March 7, 1957; Final Judgment in Condemnation filed March 8, 1957; Notice of Appeal filed April 19, 1957; Notice of Appeal filed April 22, 1957; Motion to Set Aside Judgment; Order entered December 6, 1957; Notice of Appeal filed January 2, 1958; Designation of Contents of Record, filed January 7, 1958,

and Counter-Designation of Contents of Record on Appeal, are the originals filed in Case No. 1726, United States of America vs. 11,211.45 acres of land, more or less, in the Counties of Liberty and Toole, State of Montana; Clarence A. Kolstad, et al., and Unknown Owners, and designated by the parties as the record on appeal herein.

I further certify that the Transcript of Testimony in three volumes, and Defendants' Exhibits Nos. 2 through 20, inclusive, and 36 and 37, and Plaintiff's Exhibits Nos. 21 through 35, inclusive, are the original Reporter's Transcript of testimony, and the original exhibits introduced in evidence at the trial of this cause and are part of the record on appeal herein.

Witness my hand and the seal of said court this 18th day of January, 1958.

[Seal] /s/ DEAN O. WOOD,
Clerk as Aforesaid.

[Title of District Court and Cause.]

United States of America,
District of Montana—ss.

CERTIFICATE OF CLERK

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the papers hereto annexed, to wit:

Affidavit, filed Nov. 4, 1957;

Exhibits attached to Affidavit;

Amended Counter-Designation of Contents of
Record on Appeal, filed Jan. 29, 1958;

are the originals filed in Case No. 1726, United
States of America vs. 11,211.45 acres of land, more
or less, in the Counties of Liberty and Toole, State
of Montana, et al., and designated by the Appellee
for inclusion in the record on appeal in said cause.

I further certify that the following documents or
papers, to wit:

Final Judgment entered March 8, 1957;

Motion to Set Aside Judgment filed November
4, 1957;

Order entered December 6, 1957;

Notice of Appeal filed March 7, 1957;

Notice of Appeal filed April 19, 1957;

Notice of Appeal filed April 22, 1957;

named in the Amended Counter-Designation of Con-
tents of Record on Appeal (annexed to this certifi-
cate) were transmitted as part of the Record on
Appeal to the United States Court of Appeals for
the Ninth Circuit in the above-entitled cause, on
January 18, 1958.

Witness my hand and the seal of said Court this
29th day of January, A.D. 1958.

[Seal]

DEAN O. WOOD,

Clerk as Aforesaid;

By /s/ C. G. KEGEL,

Deputy Clerk.

[Title of District Court and Cause.]

United States of America,
District of Montana—ss.

CERTIFICATE OF CLERK

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the papers hereto annexed to wit:

Two Statements of Points on Appeal, filed February 3, 1958;

Resistance to Motion to Set Aside Judgment, filed November 18, 1957;

Transcript of Hearing on Motion for a New Trial, filed February 3, 1958;

Designation of Contents of Record on Appeal, filed February 3, 1958;

Amended Designation of Contents of Record on Appeal, filed February 5, 1958,

are the originals filed in Case No. 1726, United States of America vs. 11,211.45 acres of land, more or less, in the Counties of Liberty and Toole, State of Montana, et al., and designated by the Appellee for inclusion in the record on appeal in said cause.

I further certify that the following documents or papers, to wit:

Motion to Set Aside the Judgment,
Affidavit in Support of Motion to Set Aside the Judgment,

Order of Court dated December 5, 1957,
were named in the Designation annexed to this

certificate, and were transmitted as part of the Record on Appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause on January 18th, 1958.

Witness my hand and the seal of said Court this 7th day of February, A.D. 1958.

[Seal]

DEAN O. WOOD,

Clerk as Aforesaid;

By /s/ ELIZABETH C. McKEE,

Deputy Clerk.

[Endorsed]: No. 15871. United States Court of Appeals for the Ninth Circuit. Clarence A. Kolstad and Alta A. Kolstad, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed January 22, 1958.

Docketed: February 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

NO. 15871

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
Appellants,

—VS—

UNITED STATES OF AMERICA,
Apellee.

PETITION FOR REHEARING

Messers. Cedor B. Aronow and Elmo J. Cure,
Attorneys-at-Law,
153 Main Street,
Shelby, Montana.
Attorneys for Appellants.

FILED

JAN 26 1959

PAUL P. O'BRIEN, CLERK

NO. 15871

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
Appellants.

—VS—

UNITED STATES OF AMERICA,
Apellee.

PETITION FOR REHEARING

Messers. Cedor B. Aronow and Elmo J. Cure,
Attorneys-at-Law,
153 Main Street,
Shelby, Montana.
Attorneys for Appellants.

PETITION FOR REHEARING

The appellants above named respectfully petition this Honorable Court for a rehearing on the appeals in the above entitled cause, and in support of this petition, represent to the Court as follows:

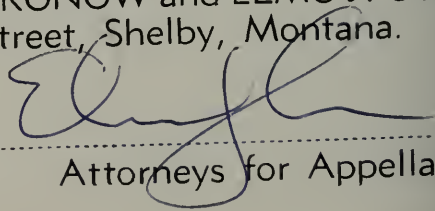
That there were two appeals in this matter, namely: one from the judgment, and the second from the ruling on the Motion under Rule 60-(b), F. R. C. P.

The Judgment on Appeal deals solely with the appeal from the Judgment on the Motion Under Rule 60 (b), F. R. C. P. These appeals deal solely with Parcels 10 and 11, described in the Complaint. The stipulation for dismissal of the appeal (tr. p. 33), which was referred to by this Honorable Court, on p. 3 of the Judgment on Appeal, did not deal with Parcels 10 and 11, but dealt solely with Parcels 27, 28, 29 and 31, which were not owned by appellants, and should not have been included in the transcript.

For the foregoing reasons we respectfully petition for a rehearing, in order that the Court may dispose of the second appeal.

CEDOR B. ARONOW and ELMO J. CURE,
153 Main Street, Shelby, Montana.

By.....


Attorneys for Appellants.

No. 15875 ✓

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant,

vs.

JOSEPH SALMERI,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 56)

FILED

MAY - 2 1958.

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

No. 15875 ✓

**United States
Court of Appeals**
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant,

vs.

JOSEPH SALMERI,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 56)

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Nave, Frederic G.	48
Answer to Libel, Union Oil Co.	10
Answer to Libel in Personam, Cardinale.....	13
Attorneys, Names and Addresses of.....	1
Certificate of Clerk to Record on Appeal.....	50
Designation of Contents of Record on Appeal..	52
Final Decree	44
Findings of Fact, Conclusions of Law and Decision	17
Libel	3
Notice of Appeal.....	46
Order Re Consolidation	16
Order Extending Time.....	47
Statement of Points on Appeal, Appellant's...	53
Stipulation Extending Time to File Record and Docket Appeal.....	46

INDEX	PAGE
Transcript of Proceedings	57
Witnesses:	
Adagio, Horace	
—direct	123
—cross	143, 163
Belleci, Antoine	
—direct	271
—cross	288, 295
—redirect	298
Byrne, Joseph	
—direct	629
Caldwell, Charles Herbert	
—direct	335
—cross	386, 398, 403
—voir dire	393
—redirect	418, 422, 426
—recross	421, 423, 425, 428
Civello, Arthur A.	
—direct	575, 588, 598
—cross	584, 593
Cox, Wilbur J.	
—direct	468
—cross	476
Del Rio, Rudy	
—direct	489
—cross	497, 502
—recross	506

INDEX**PAGE****Witness—(Continued)****Hansen, Irvin**

—direct	649
—cross	673, 675

Hill, James Ewing

—direct	552
—cross	565
—redirect	570
—recross	571

Johnson, Lester

—direct	509
—cross	427
—redirect	571

Lopez, Francisco Pedrasaz

—direct	302
—cross	321, 332

Mason, David M.

—direct	429
—cross	448, 460

McMillan, James Boyce

—direct	533, 541
—cross	547

Ray, Garrett

—direct	173
—cross	187, 208

Romeo, Salvatore

—direct	250
—cross	258

Witness—(Continued)

Salmeri, Joe John

—direct	77
—cross	96, 114
—redirect	121
—recross	119, 122

Tarantino, Nino

—direct	214
—cross	231, 242
—redirect	243

Washburn, George

—direct	605
—cross	621

NAMES AND ADDRESSES OF ATTORNEYS

RUSSELL ZACHES,
316 Professional Bldg.,
Monterey, California;

SAMUEL VARTAN,
1020 Russ Bldg.,
San Francisco 4, California;

MICHELSON, WHELAN AND MICHELSON,
1650 Russ Bldg.,
San Francisco 4, California,

Proctors for Libelant & Appellee.

FREDERIC G. NAVE,
BOYD & TAYLOR,
350 Sansome St.,
San Francisco, California,

Proctors for Respondent & Appellant.

In the District Court of the United States in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty No. 27117

JOSEPH SALMERI,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation; FRANCES E. CARDINALE, Ad-
ministratrix of the Estate of FRANK JOSEPH
CARDINALE, Also Known as FRANK J.
CARDINALE, Deceased; IDALINE JENNER
CARDINALE, BLACK COMPANY, a Corpo-
ration; WHITE COMPANY, a Corporation;
JOHN DOE, RICHARD ROE and PETER
ROE,

Respondents.

LIBEL

(Damages for Personal Injuries—\$100,000.00)

To the Honorable Judges of the Above-Entitled
Court:

The libel of Joseph Salmeri, in a case of libel,
civil and maritime, for damages for personal in-
juries, alleges as follows:

I.

That the respondent Union Oil Company of Cali-
fornia is now and was at all times herein mentioned

a corporation duly organized and existing under and by virtue of the laws of the State of California and authorized to do and doing business in the City and County of San Francisco, State and Northern District of California.

II.

That the respondents Black Company, a corporation, and White Company, a corporation, are now and were at all times mentioned herein corporations duly organized and existing under and by virtue of the laws of one of the States of the United States and were at all of said times authorized to do and doing business in said City and County of San Francisco, State and Northern District of California.

III.

That the true names of respondents Black Company, a corporation; White Company, a corporation; John Doe, Richard Roe and Peter Roe, are unknown to libelant and for that reason said respondents are sued herein under fictitious names. Libelant prays that when the true names of said respondents are ascertained they be substituted herein in the place and stead of said fictitious names.

IV.

That on or about the 28th day of September, 1954, Frank Joseph Cardinale, also known as Frank J. Cardinale, died; that thereafter, to wit, on the 12th day of November, 1954, after proceedings duly had for such purpose, respondent Frances E. Cardinale

was duly appointed administratrix of the estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, by the Superior Court of the State of California, in and for the County of Monterey and on said 12th day of November, 1954, qualified as such administratrix and entered upon the administration of said estate and ever since such time has been and now is the duly appointed, qualified and acting administratrix of the estate of said Deceased. That said Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, will hereinafter be referred to as "Decedent."

V.

That at all times on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, and for a long time prior thereto, said Decedent and respondent Idaline Jenner Cardinale owned, operated, managed, controlled, navigated and maintained the fishing vessel Santa Lucia, which vessel was at all of said times a vessel of the American Merchant Marine, employed as a commercial fishing vessel.

VI.

That at all times on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, libelant was employed by said Decedent and respondent Idaline Jenner Cardinale, to work as a seaman, to wit, as a fisherman on board, and as a member of the crew of, said vessel

Santa Lucia, and was working on board said vessel in the course and scope of his said employment; that during all of said times said vessel was afloat on navigable waters.

VII.

That on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged and for a long time prior thereto, respondent Union Oil Company of California, a corporation, owned, maintained, managed, operated and controlled, on piers and land at Avila, California, a commercial marine service and fueling station, gasoline, oil and other petroleum products, tanks and other facilities for the storage of said gasoline, oil and other petroleum products, and equipment for use in connection with said commercial marine service and fueling station, gasoline, oil, other petroleum products, tanks and other facilities.

VIII.

That on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, and while said vessel was moored at one of said piers in connection with the fueling of said vessel by respondent Union Oil Company of California, a corporation, and said commercial marine service and fueling station, said Decedent and respondents herein, except respondent administratrix, negligently caused and permitted an explosion and fire to occur in, on, around and about said vessel, whereby libelant was made weak, sick, sore, lame,

stiff and disabled and caused to suffer a fracture of his right clavicle, compound comminuted fractures of the bones of his right wrist and arm, injury to the nerves of his right wrist and arm, severe contusions and lacerations of the muscles of the right wrist and arm, second degree burns of his extremities and body, contusions, bruises, sprains and strains of the entire right arm, wrist, hand and shoulder extending into the base of the neck, other parts of the body and great nervous shock; that because of said injuries libelant ever since receiving the same, has been and always will be weak, sick, sore, lame, stiff, disabled and deformed; that the aforesaid negligence of Decedent and respondents herein, except respondent administratrix, directly and proximately caused libelant to be injured as aforesaid and Decedent and respondents herein, except respondent administratrix, did negligently cause and permit libelant to be so injured.

IX.

That because of said injuries, libelant has suffered ever since receiving the same and always will suffer great physical and mental pain and anguish.

X.

That immediately prior to being injured as aforesaid, libelant was in good physical and mental condition and earning or capable of earning at his occupation of seaman approximately \$350.00 per month, together with his board and lodging of the

reasonable value of \$240.00 per month, but because of said injuries, libelant has been unable to work or even earn any money since the said 28th day of September, 1954, will be unable to work or earn money for a long period of time to come, and thereafter will only be able to work and earn money at great financial loss.

XI.

That because of said injuries and the aforesaid negligence of Decedent and respondents herein, except respondent administratrix, libelant necessarily incurred reasonable hospital and other medical bills in a reasonable sum presently unknown to libelant and libelant in the future will necessarily incur further and additional reasonable expenses for hospital and other medical expenses in an amount not as yet known to libelant, and as to which libelant prays leave to amend this libel and produce proof thereof at the time of trial.

XII.

That by reason of the premises, libelant has been damaged in the sum of \$100,000.00, which amount libelant asks be awarded to him by this Court.

XIII.

That libelant's aforesaid claim in respect to damages for personal injuries was heretofore and within the time prescribed for the filing of creditor's claims by the provisions of the Probate Code of California and the Notice to Creditors published by respondent

Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, duly and regularly presented to the said Estate as directed in said Notice to Creditors, and said claim has been rejected and disallowed.

XIV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process, according to the courses of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the respondents and each of them and that respondents and each of them may be cited to appear and answer, all and singular, the matters aforesaid and that this honorable Court would be pleased to decree to the libelant the sum asked for by the libelant in the aforesaid libel and for costs and for such other and further relief as in law and justice libelant is entitled to receive.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Proctors for Libelant.

United States of America,
State and Northern District of California,
County of Monterey—ss.

Joseph Salmeri, being first duly sworn, deposes and says:

That he is the libelant named in the above-entitled cause; that he has read the within and foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ JOE SALMERI.

Subscribed and sworn to before me this 2nd day of May, 1955.

[Seal] /s/ EDNA MASON,
Notary Public in and for the County of Monterey,
State of California.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

No. 27117

ANSWER TO LIBEL

Comes now the Respondent, Union Oil Company of California, a corporation, and answering Libelant's Libel on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs IV, VI, VII, IX, X, and XIII, said respondent alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

II.

Answering Paragraphs VIII, and XI, denies each and every, all and singular, the allegations therein contained and each and every part thereof insofar as the same names, mentions or concerns this answering respondent.

III.

Answering Paragraphs XII and XIV, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that Libelant, Joseph Salmeri, has been damaged in the sum of \$100,000.00 or any other sum or sums whatsoever or at all.

Further answering said Libel, and as and for a separate and distinct defense thereto and plea of contributory negligence, said respondent alleges that Libelant, Joseph Salmeri, was negligent and careless in and about the matters set forth in said Libel in the following manner, to wit: that at the said time and place Libelant, Joseph Salmeri, failed to use due or any care or caution for the protection of his own safety; that said acts of carelessness and negli-

gence on his part proximately caused or contributed to the damage sustained or injury sustained.

Wherefore, said respondent prays that Libelant take nothing by his action and that said respondent be hence dismissed with its costs herein incurred.

BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Respondent, Union Oil Company of
California, a Corporation.

State of California,
City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says: That he is one of the proctors for respondent herein; that he has read the foregoing Answer to Libel and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of June, 1955.

[Seal] /s/ VIRGINIA RUTH HOLLOWAY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Aug. 11, 1956.

Affidavit of service by mail attached.

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

No. 27117

ANSWER TO LIBEL IN PERSONAM

To the Honorable Judges of the Above-Entitled Court:

Frances E. Cardinale, administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, deceased, and Idaline Jenner Cardinale answer the Libel filed herein, admitting, denying and alleging as follows:

I.

Answering Paragraphs II, III, VII, IX, X and XI of libelant's Libel, respondents allege that they have no information or belief sufficient to enable them to answer the allegations therein contained, and, basing their denial on that ground, deny each and every, all and singular, the allegations therein contained.

II.

Answering Paragraphs V, VI, VIII and XII of said Libel, respondents deny each and every, all and singular, the allegations therein contained.

Deny that libelant Joseph Salmeri has been damaged in the sum of \$100,000.00, or any other sum or sums whatever, or at all.

Wherefore, respondents Frances E. Cardinale and Idaline Jenner Cardinale pray that libelant take

nothing by his action and that said respondents be dismissed with their costs herein incurred.

/s/ MORTON L. SILVERS,

MORGAN & BEAUZAY,

Proctors for Respondents Frances E. Cardinale and
Idaline Jenner Cardinale.

State of California,
City and County of San Francisco—ss.

Frances E. Cardinale, being first duly sworn, deposes and says:

That she is one of the respondents in the above-action; that she has read the foregoing Answer to Libel In Personam, and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

/s/ FRANCES E. CARDINALE.

Subscribed and sworn to before me this 1st day of October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 18, 1958.

State of California,
City and County of San Francisco—ss.

Idaline Jenner Cardinale, being first duly sworn,
deposes and says:

That she is one of the respondents in the above
action; that she has read the foregoing Answer to
Libel in Personam, and knows the contents thereof;
that the same is true of her own knowledge, except
as to the matters which are therein stated on her in-
formation or belief and as to those matters that she
believes it to be true.

/s/ IDALINE JENNER
CARDINALE.

Subscribed and sworn to before me this 1st day of
October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 18, 1958.

Affidavit of service by mail attached.

[Endorsed]: Filed Oct. 4, 1955.

[Title of District Court and Cause.]

MINUTE ORDER RE CONSOLIDATION
OF CASES

(August 5, 1957)

Present: The Honorable Louis E. Goodman,
District Judge.

27116—Salmeri vs. Cardinale.

27117—Salmeri vs. Union Oil Co. of Calif.

27118—Pedrasaz vs. Cardinale.

27119—Pedrasaz vs. Union Oil Co. of Calif.

27120—Tarantino vs. Cardinale.

27121—Tarantino vs. Union Oil Co. of Calif.

27122—Belleci vs. Cardinale.

27123—Belleci vs. Union Oil Co. of Calif.

27124—Belleci vs. Cardinale.

27125—Belleci vs. Union Oil Co. of Calif.

27156—J. Romeo vs. Union Oil Co. of Calif.

27157—S. Romeo vs. Union Oil Co. of Calif.

27158—Cardinale vs. Union Oil Co. of Calif.

27159—Adagio vs. Union Oil Co. of Calif.

The above-entitled cases came on regularly this day to be set for trial. On motion of John Whelan, Esq., Ordered all of these cases and case No. 27364—Cardinale vs. Union Oil Company be consolidated and trial set for August 26, 1957.

[Title of District Court and Cause.]

No. 27,116 and Consolidated Cases

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION OF THE COURT

Reporter's Transcript
September 12, 1957

Before: Hon. Sylvester Ryan, Judge.

Appearances:

For the Libelant:

SAMUEL VARTAN, ESQ.,
MICHELSON, WHELAN &
MICHELSON, By
JOHN J. WHELAN, ESQ.

For the Respondents:

MORTON L. SILVERS, ESQ.,
BOYD AND TAYLOR, By
FREDERIC G. NAVE, ESQ.

The Court: It is five minutes after 1:00. Mr. Silvers is not yet here. What is the practice in this District? In my District it is the practice to proceed, since we have no evidence to take and are convened here only to render my decision. Is that the practice here?

Mr. Vartan: Yes, your Honor.

The Court: I have, since the adjournment of yesterday, reviewed the notes I made during the

trial on the evidence; I have refreshed my memory from this reading; I have considered all the evidence, and the arguments made by the able proctors, and now render my Findings and Decision.

I desire to thank counsel for their unfailing kindness and courtesy extended to me throughout the trial, and to commend each and every one of them for the diligent, efficient and conscientious manner in which they represented the interests for which they have appeared.

The Santa Lucia was a diesel-powered fishing vessel of the purse seiner class. She had been built in 1937 with a 2-inch by 6-inch pine hull exterior, and frame of 3-inch by 4-inch and 6-inch by 6-inch, and wooden decks of 2 $\frac{3}{4}$ -inch by 3 inches. Her beams were 8 $\frac{1}{4}$ x1 $\frac{1}{2}$, spaced at 22 inches. She had one hold of 75-ton capacity with one hatch, which was used as a fish hold. The hull was 72.8 feet long, 20.5 feet beam, and depth of 9.6 feet.

The ship was 109 gross tons and 69 net tons. She was [2*] manned by a crew of 10, including her master-co-owner Frank J. Cardinale. We have received photographs of her in evidence.

The Santa Lucia at all times material was owned, operated and controlled by Frank J. Cardinale and Idaline Jenner Cardinale as co-owners. She was of American registry and was employed as a commercial fishing vessel.

She now rests on her bottom in the deep water off shore of Avila, California. She is a total loss. She

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

was towed to sea following an explosion and fire which occurred aboard her on September 28, 1954, while she was taking on gasoline at the Marine Gasoline Service Station operated by Union Oil Company of California at its pier and wharf at Avila.

Frank J. Cardinale, the co-owner of the Santa Lucia, met his death in that catastrophe, and on November 12, 1954, Frances E. Cardinale, his widow, was duly appointed by the Superior Court of the State of California, Monterey County, and thereafter duly qualified as administratrix of his estate.

A prior libel in personam filed by Frances E. Cardinale and others against Union Oil Company of California, File No. 27,098, to recover for the alleged wrongful death of Frank J. Cardinale was tried to this Court on November 30, 1955, and resulted in the entry of a final decree and judgment dismissing the libel upon the merits.

Exceptive allegations pleaded under this decree and judgment as a bar to the libel now before this Court, filed by the [3] said Frances E. Cardinale as administratrix, and Idaline Jenner Cardinale, File No. 27,364, to recover for the loss of the Santa Lucia was overruled by Order entered on December 20, 1956.

This Court may take notice of the proceedings had on the libel No. 27,098 had in this District, and it has done so.

It may likewise reconsider the questions of law presented by the exceptive allegations heretofore overruled, and it has done so.

This Court accepts, agrees with and applies the

ruling heretofore made overruling these exceptive allegations, and it has therefore considered the libel filed by the said administratrix and Idaline Jenner Cardinale upon its merits and on the evidence presented.

It appears from the evidence that shortly before 6:00 p.m. on September 28, 1954, the Santa Lucia approached the wharf of the Union Gas Company of California at Avila from the southeast. One of three men standing on the deck above her cabin called to Charles H. Caldwell, the employee of the Union Gas Company who was in charge of servicing small craft at the wharf marine marketing station, and said that he wanted to take on about 30 gallons of gasoline. This was Frank J. Cardinale, now deceased, who was one of the part owners of the Santa Lucia.

Caldwell instructed him to proceed with the ship to the [4] marketing station, which was located on a projecting platform of the long pier running from the deep water wharf to shore.

We have received in evidence several photographs of this location and a diagram of said area would show the relative positions of the equipment, tanks, and other structures at the station.

As the Santa Lucia proceeded on to the marketing station, Caldwell went to the office on the wharf, picked up the charge book and his cash box, took them to the small oil shed at the marketing station, and then went over to the side of the station where the Santa Lucia was docking. The ship pulled in alongside and tied up port side to, with the bow headed to shore. Caldwell helped to tie her up. The

engines on the Santa Lucia were shut down, and Cardinale took the gas hose from Caldwell, inserted the nozzle at the end of it into the gasoline intake on the deck of the Santa Lucia.

Caldwell then opened up the valve on the dock, which permitted the flow of gasoline into the tank of the Santa Lucia. When Caldwell handed down the gasoline hose, he asked Cardinale approximately how much gasoline he would need. Cardinale, speaking in good English, replied that she would take about 30 gallons. Caldwell then asked if the deck engines of the Santa Lucia weren't diesel, if the main engines of the Santa Lucia weren't diesel, and Cardinale responded that they were but that he did not need diesel, just gasoline for his [5] auxiliary engine.

Caldwell then asked Cardinale his name and home port, and Cardinale replied that he was Frank Cardinale from Monterey.

Caldwell at this point again went back into the oil shed on the pier and checked up on Cardinale's credit. In the meantime, gasoline continued to flow down from the gasoline tank on the wharf, through the meter, and then into the rubber, reinforced with wire, hose from which it emerged through a spring lever valve control nozzle, at the end of which Cardinale had it inserted into the fill opening, which was flush with the deck, and was located just aft of the forward port side of the cabin.

In a few minutes Caldwell came out of the oil shed, looked over the rail on the wharf, saw Cardinale still filling the tank on the Santa Lucia, looked

at the meter on the wharf, saw that the Santa Lucia had taken on about 20 gallons of gasoline.

It was at this point that some of the crew of the Santa Lucia asked for water, and Caldwell passed the water hose down to them and watched as they placed it in a water fill opening near the cabin at the port aft end. The crew asked for another water hose. Caldwell passed a second one down to them, and they took it around aft of the cabin to the starboard side. Caldwell again returned to the shed, this time to make out the sales ticket. Gasoline still was flowing [6] into the Santa Lucia.

He came out of the shed in a few minutes and went then to the meter on the wharf, which showed 58½ gallons had been delivered. He called down to Cardinale that 58½ gallons had been taken on, and added that it looked as though he would take 60 gallons. At this point Cardinale shut the nozzle off immediately.

I find that Cardinale expressed surprise, and said loudly, "Where did it go to?" And immediately after shutting off the nozzle by releasing his manual pressure lever, pulled the nozzle out of the fill opening, lay it on the deck just aft of the fill opening, turned and spoke to some crewmen who were beside him. Cardinale then walked forward, around the cabin to the starboard side, and in a few minutes returned to the location of the fill opening carrying a wooden sounding stick about one-half inch square and approximately four to five feet long.

Cardinale raised the stick and was about to insert the end of it into the fill opening when an explosion

occurred and fire broke out aboard the vessel, spread to the pilings, first to the under deck of the portion of the wharf where the service station was located and later to the upper decking of the wharf.

Frank J. Cardinale was killed. Jacques Cardinale, one of the crew, also met his death. Joseph Salmeri, Francisco [7] Pedrasaz, Antoine Bellici and Nino Tarantino, all seamen on the vessel, sustained injuries, and libels in personam have been filed by them.

The claim of Nino Tarantino, libels No. 27,120 and 27,121, have been disposed of during the trial.

The remaining libels filed by the seamen Salmeri, Pedrasaz and Bellici, are before us, as is the libel filed by the administrator of the estate of Jacques Cardinale for wrongful death.

Libels in personam filed by four seamen, Joseph S. Romeo, No. 27,156; Salvadore Romeo, 27,157; Francois Cardinale, 27,158; and Horace Adagio, 27,159, for loss of wages and income simultaneously with the trial of the other libel and with the trial of the petition for limitation of liability filed by the owners of the Santa Lucia.

The libels filed by these four seamen for loss of wages and income were disposed of during the trial and are not before us.

The situation is not unusual in that there is no direct evidence as to the manner in which the explosion and subsequent fire occurred.

"The origin of gasoline fires must, in most cases, be established by circumstantial evidence." The New

Berne, 80 Fed. 2d 244 at 247; Court of Appeals, Fourth Circuit, 1935. [8]

The volatility of gasoline is now general if not common knowledge, and it is well known that "its rapid vaporization and resultant mixture of air and vapor in certain proportions is highly inflammable and will cause fire and, if closely confined, an explosion wherever there is present an igniting factor. In many, if not most instances of gasoline fires and explosions, it is very difficult to ascertain what was the actual factor of ignition. The striking of a match or other open flame, or a very small electric spark generated by friction or created by the dropping of some metallic instrument on a stone or cement floor may cause ignition if it comes in contact with mixed vapor and air. In this case, as in most others, there is no direct evidence as to what was the igniting factor."

Elkton Auto Sales Corporation against State of Maryland and others, 53 Fed. 2d 8 at page 10; Court of Appeals, Fourth Circuit, 1931.

The Court must disregard the many subtly suggested ways of origin of explosion and fire, and accept the cause as indicated by the probative effect of all the proof and circumstances. To find that the explosion did not take place on and originate from causes present aboard the Santa Lucia, one would have to be blind to the evidence. Rudy DelRio, a diver employed to examine and inspect the sunken hull of the Santa Lucia as she lay on September 29, 1954, [9] adjacent to the pier, found a section of the port side approximately four feet above the water

line and extending from the bow to the mast or end of the cabin section, was completely sheared off; that the starboard side was split open at the bow and was lying on the bottom, back to approximately the middle of the cabin section. The main deck and cabin sections were completely sheared off. The hull aft of the cabin was shattered in various spots. Looking down at the bow section from above, the starboard and main keel section was split approximately four feet apart at the bow. It was a maze of hanging cables and lines and other debris and rigging.

The *Santa Lucia* lay at the wharf, shattered, with the stern afloat and her bow dragging the bottom. All of those surviving who were present at the scene of the disaster described how immediately following the explosion the debris of the cabin or deck housing flew through the air.

The explosion and fire had origin in the bowels of the *Santa Lucia* and below her deck.

We next consider what was the probable cause of the explosion and fire as shown by the evidence.

The gasoline fuel tank into which the 58½ gallons were delivered or poured was located in the engine room under the main deck, suspended there beneath the deck by hangers. It could not be seen by one on deck. The tank was of metal [10] construction, approximately 48 inches by 24 inches by 6 inches, and had a capacity of 30 gallons.

As the tank was filled, the excess delivery of at least 28 gallons had to go somewhere. The tank did not overflow on deck through the fill opening. There

was only one other place the excess could go, and that was below.

Sketch No. 3 of Respondent's Exhibit 6 depicts the tank and the piping leading from it. Directly beneath the bottom of the tank were two valves. One carried no further piping and was designed for drainage and cleaning purposes. This valve may have been leaking or open. We do not know. No one was in the engine room where the gasoline tank was located.

The other valve connected with a copper piping and ran to a point where a branch feed line ran to a gasoline engine, which operated an auxiliary generator. On this branch feed line there was a third valve. If this valve were not shut off, gasoline would have a gravity flow into the carburetor of this small engine, and when the carburetor glass container was filled, it overflowed and soon flooded the deck area about the auxiliary engine. This valve may have been left open. There is testimony that this and all the valves had been closed off. The Court does not accept it as the truth.

Continuing beyond this branch line to the engine of the auxiliary generator was further piping leading to the Wisconsin [11] pump, and just before the line reached the engine of this pump was a fourth valve. The situation with reference to this valve was the same as the valve of the engine for the auxiliary generator. If it was not turned off, it would flood the engine and continue to pour on through to the deck.

Gasoline leakage there was, either from the tank, the couplings, the piping, the engine or the valves.

The leakage resulted in making the Santa Lucia unsafe and unseaworthy, and was a proximate cause of the explosion.

The evidence also disclosed that there were a number of electric storage batteries in the engine room, which were used to supply electric power. How many there were we do not know, nor has the owner produced any witness who could describe in detail the equipment in the engine room or on the ship, nor have we had a ship's plan presented in the evidence. Such sketches as we have had of the ship are rough indeed and leave much to be desired, and were made by an insurance ship's surveyor after the explosion and while his deposition was being taken. The surveyor's memory is not reliable as to many matters.

It appears, too, that these auxiliary engines which operated the generator and pump could be shut off either by cutting the electric current from the batteries or by turning the valve on the gasoline feed line. If the engines were shut down by cutting off the circuit, the gasoline would [12] continue to flow until the valve was manually turned off. That there was a leakage of gasoline into the engine room and bilge of the ship is clear.

We come now to a consideration of the cause of the ignition of the vapor which of necessity followed the gasoline leakage. The galley, located on the main deck, had a diesel cooking stove. It was close to supper time. The cook said he had made french fried potatoes, and had turned off the burner; that he intended to cook steaks, and that he had prepared

them and was waiting to cook them after the fueling operation had been completed. We accept that testimony with some reluctance.

It appears undisputed that a pilot light on this diesel cooking stove remained lit during all the time the gasoline was pouring into the ship. The pilot light, if turned down, projected a quarter inch flame; if not turned down, a flame of about one and one-quarter inches. The cook testified it had been turned down. We accept this testimony with similar reluctance.

In the galley was a water supply which came from a tank and when the tank ran low from water use, an electric motor powered pump started operating in the engine room. The cook was working in the galley. If this electric motor in the engine room started to replenish the water in the tank, common sense tells us that sparks generated would have been efficient means and sufficient means [13] to ignite gasoline vapors then present.

The nozzle of the hose through which the gasoline poured into the Santa Lucia was a spring lever type, and was so constructed as to permit the flow of gasoline through the nozzle. The lever was opened by manual pressure, and to stop the flow the lever was merely released.

Frank J. Cardinale held this nozzle and controlled this flow. He had ordered 30 gallons of gasoline. He was chargeable with knowledge of the capacity of the gasoline tank on his own small fishing vessel. He had been told when 20 gallons had been delivered. The exercise of common sense and pru-

dence should have warned him something was wrong when 381½ more gallons flowed into the tank with no overflow from the fill opening.

Frank J. Cardinale, one of the owners, was personally negligent and at fault in the manner in which he conducted this operation.

We conclude that the explosion was due to an unseaworthy condition aboard the *Santa Lucia*, and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the ship.

We conclude that the owners are personally liable in these libels in personam for the injuries and damage sustained by the members of the crew.

We now come to consider whether the Union Oil Company of [14] California was at fault and was negligent, and whether its negligence was a proximate and contributing cause of the catastrophe.

Although Cardinale aboard the *Santa Lucia* had control of a means by which the flow of gasoline could be shut off, he did not have control of the only means by which that could be done. Located on the wharf of the Union Gas Company was a control valve by which the delivery of gas could be shut off by one quarter turn. The Union employee, Caldwell, on the wharf had opened this valve to permit the flow of gasoline at the very beginning of the delivery. If he had not opened this valve, gasoline could not have flowed into the *Santa Lucia*.

Delivery was being made of a highly inflammable liquid. The Union Gas Company and its employees were chargeable with the knowledge of its volatile character, and Caldwell himself had personal knowl-

edge of this as is disclosed by his statement in Respondent's Exhibit 11 wherein he stated, "We are always alert to potential sources of ignition on a private boat when fueling. I could not hear any engines running and could see no one smoking. I observed no activity in the galley. I didn't hear the radio running."

The piping, tanks and equipment at the marine service station was in good order and condition. There was no leakage or break. The fire and explosion did not originate on this [15] wharf.

The Union Gas Company may not shed itself of all responsibility in connection with the delivery of this highly inflammable material by urging that it was a self-servicing operation in which the Santa Lucia exercised sole control, and assumed to all full responsibility. I find it was a joint operation. Both the Santa Lucia and the Union Oil Company were required in law to exercise care and prudence. Whether they did so under the circumstances is a question of fact for the Court to determine at the trial of all factual issues.

I find that the Union Oil Company was negligent and at fault, that it did not exercise reasonable care and prudence, and that its failure so to do was a proximate cause of the explosion and fire on the Santa Lucia.

There was a meter on the wharf which measured and recorded the flow of gasoline into the Santa Lucia. It was located about five feet set back from the edge of the dock. It was not visible to Cardinale as the gasoline flowed, or to anyone aboard the ship,

which was riding with the deck about nine feet below the coaming of the wharf.

The numerals recording the flow were about one quarter to three-eighths inch in height, and it stood about 26 inches above the floor. There was a duty upon Caldwell to keep some watch on this meter, particularly in view of the fact that he knew that the Santa Lucia was diesel powered, that [16] gasoline was being taken on only for the auxiliary engine; that he had been told the Santa Lucia wanted about 30 gallons, and that Cardinale had later told him, "This ship will take about 30 gallons," and that as delivery was being made he had looked at the meter and found that 20 gallons had already been delivered.

Caldwell did not exercise the care of a reasonably prudent man when he failed to look at the meter until 58½ gallons had been delivered. Caldwell was negligent and at fault. His negligence is chargeable to his employer, the respondent Union Gas Company of California. His negligence contributed to causing the disaster.

We conclude that the libelant seamen may recover against both respondents for all damages sustained by reason of their negligence, in which they were joint tort feasons. We further conclude that in the libel filed for damages to the ship itself, Libel No. 27,364, both the owners of the vessel and the Union Gas Company of California were at fault and to blame and must share the loss equally.

A libel in personam was filed by Joseph Salmeri in this court on May 3, 1955, against Frances E.

Cardinale, administratrix of the estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, deceased, and Idaline Jenner Cardinale and others; and by this libel a claim for personal injuries and for maintenance and cure was asserted against respondents [17] as the owners of the Santa Lucia.

It is undisputed that on September 28, 1954, this libelant was employed aboard the Santa Lucia as a fisherman and as a member of the crew, and was injured in the course of this employment on the vessel during the explosion. This libel bears File No. 27,116.

This libelant makes claim for maintenance and cure, and also states damages in the sum of \$100,000.00 for personal injury he alleges he sustained by reason of the unseaworthiness of the Santa Lucia.

A further and additional libel was filed by Salmeri on July 31, 1955, against Union Oil Company of California and Frances E. Cardinale, as administratrix, and Idaline Jenner Cardinale. By this libel a claim for personal injuries resulting from the negligence of all the respondents is asserted in the amount of \$100,000.00. This libel bears File No. 27,117, and has been consolidated for trial with No. 27,116.

Salmeri is 37 years of age. He has been a fisherman for 21 years. He had worked aboard the Santa Lucia for two or three weeks prior to the explosion as a deck hand and stiff man while bringing in anchovies. He had never been in the engine room and knew nothing of its equipment.

Salmeri had helped tie up the ship at the Union Gas wharf and then had gone to the center of the hatch to help clean off the anchovies remaining from the hanging net. He was using a [18] brail to do this. Suddenly he heard the explosion. He was thrown. He noticed his arm was broken. He suffered great pain. He was put into the skiff and later brought to shore.

Salmeri was taken directly to the French Hospital and remained there until October 12, 1954. It was found that he had sustained a comminuted fracture of both the radius and ulna, both bones of the left forearm, which required two separate incisions for reduction fixation with intra-medullary pin and insertion of Kirshner wire, and a third incision for relaxing injury to motor glands of the radial nerve.

It was also found that he had suffered a fractured clavicle, left, flash burns, severe soft tissue damage to his shoulder and arm. The arm was placed in full arm cast. There was later a secondary closure, 11-inch incision, left forearm, following removal of posterior splint.

The final diagnosis was: "Fracture of the clavicle at the juncture of the middle and outer thirds, with upward displacement of medial fragment with minimal overriding. Fracture of right radius and ulna. Comminuted fracture through the junction of the proximal and middle third of the radius with moderate deformity. Comminuted fracture through the midportion of the shaft of the ulna with relatively good position.

There is no question that there is a nonunion of the ulna fracture, and that a bone grafting operation is indicated to alleviate the condition. [19]

It is undisputed that the following expenses are already incurred: San Luis Clinic, \$502.88; anesthesia bills, \$155.00; Dr. Swengel, \$600.00; Monterey Hospital, \$360.50, totaling \$1,618.38; and that the cost of the bone grafting operation and hospitalization will be about \$1,200.00.

The total cost of cure and subsequent treatment are fixed at \$2,818.38. Since no Marine Hospital was immediately available, he may recover because of the prior treatment at these hospitals, and he should not be required to go to the Marine Hospital for the subsequent operation, but may have that corrective operation performed by the doctors who are familiar with his condition by reason of their prior treatment.

Salmeri was at Monterey Hospital from April 14, 1955, to April 17, 1955; from October 12th to October 24th, 1955. We have not had in evidence the records of the Monterey Hospital treatment.

Salmeri went back to work for the Fishermen's Union about eight months after the explosion. He is entitled to maintenance for this period of 240 days, less 15 days at French Hospital, or a total of 225 days at \$8.00 a day, and in addition, for a 6-months period of convalescence following the indicated bone grafting operation, or an additional 180 days at \$8.00 a day, making a total of 405 days at \$8.00 a day, or \$3,240.00 for maintenance. His claim for cure and maintenance I fix at \$6,058.38. [20]

I find that he will never again be able to work as a fisherman; that he will also suffer serious impairment in the functioning and use of his arm; that he will suffer and has suffered great pain and distress.

I fix his total damage, including maintenance and cure, at the sum of \$38,308.38, and award him judgment in that amount against all the respondents as joint tort feorsors.

Two libels in personam were also filed by Antoine Bellici, a member of the crew, on his behalf. These libels, Nos. 27,122 and 27,123, are similar to the libels filed by his fellow seamen and seek recovery from the owner of maintenance and cure and of all the respondents for negligence, and of respondent owners for injuries sustained by reason of the unseaworthiness of the vessel.

Bellici was the cook on the vessel. I cannot find any negligence of his contributed to the happening of the explosion. He was in the galley. The explosion took place and the fire began below deck.

Bellici is 53 years old. He received an injury to the left side of his head above the ear, a knock or bruise of no great moment. His right arm was swollen above the elbow. He had bruises around his ribs, and his back suffered some strain.

He was at the French Hospital from September 28, 1954, to October 1, 1954, a period of three [21] days.

I fix his cure at \$255.12, being the charge of the French Hospital, and \$165.50 and of the San Luis Clinic of \$88.62. No nearby Marine Hospital was available for emergency and immediate treatment.

I fix due to him for maintenance 220 days from October 1, 1954, to May 18, 1955, at \$8.00 a day, totaling \$1,760.00, or a total of maintenance and cure of \$2,015.12.

Prior to the explosion he was suffering from degenerative arthritis and much of the pain in his back is due to this condition. However, I find it to have been aggravated by the injuries sustained at the time of the explosion. I find that the libelant is entitled to judgment jointly, including the cost of maintenance and cure, against all of the respondents as joint tort feasons in the sum of \$3,515.12.

Two libels in personam were also filed by Francisco L. Pedrasaz, who was also one of the crew of the Santa Lucia. A libel numbered 27,118 filed by Pedrasaz on May 3, 1955, named Frances E. Cardinale, administratrix of the estate of Frank J. Cardinale, and Idaline Jenner Cardinale as respondents. This libel asserted a claim against the respondents, the owners and operators of the Santa Lucia, and as the employers of Pedrasaz, and recovery in the amount of \$100,000.00 is sought for personal injuries alleged to have been sustained by libelant Pedrasaz at the time of the explosion. This claim is predicated upon allegations of unseaworthiness of [22] the vessel Santa Lucia. And the libel also alleges a claim for maintenance and cure.

He also filed libel No. 27,119 against the owners of Union Oil Company seeking recovery on a claim predicated on negligence.

Pedrasaz is 36 years of age. He was a member of the Butcher's Union prior to the explosion and at

times worked as a fisherman. He was one of the crew. He was working on the deck when the explosion occurred. He was taken to French Hospital and remained there until October 4, 1954. He was found to have bruises to his right ankle, but no break, and examination of his right wrist and forearm showed markedly comminuted fracture of the distal end of the radius. The fracture entered the joint space and resulted in an impaction, shortening and reversal of the plane of the articular surface of the radius.

He was taken to the United States Marine Hospital on October 4, 1954, and remained there until October 13, 1954, and a closed reduction was accomplished and the wrist was placed in a cast. It was found that he had a right Colles fracture, and right incomplete fracture of the medial malleolus.

Pedrasaz was readmitted to the United States Marine Hospital on February 14, 1955, and the following day an osteotomy was performed on the right radius and graft taken [23] from the crest of the right ilium. He was discharged from the hospital on February 26, 1955, and was on July 26, 1955, reported to have fully healed to all practical purposes, and was then able to go to work.

Although he has some partial disability to his wrist, arm and power of grasp, some numbness in the distal tip of his right index finger, he has been working as a butcher making \$90.00 a week, which is as much as he was earning before.

I fix Pedrasaz's cure at \$167.37, the bill of the French Hospital, and fix maintenance from October

13, 1954, to July 26, 1955, save for the period when he was in the Marine Hospital in February, 1955, or for total of 274 days at \$8.00 a day, or a total of \$2,192.00, making a total for maintenance and cure of \$2,359.37.

For pain and suffering and impairment of full use of his arm, for all the damage he has sustained, including his claim for maintenance and cure, I grant him judgment jointly against all the respondents in the sum of \$14,167.37, as joint tort feasers.

Two libels in personam were also filed by Antoine Bellici as administrator of the estate of Jacques Cardinale, to recover for his wrongful death. A libel filed on May 3, 1955, named the owners of the Santa Lucia as respondents, and sought judgment in the behalf of the widow and two minor children [24] of the deceased upon a claim of unseaworthiness, and a libel filed on the same day, No. 27,125, named the Union Oil Company of California and the owners of the Santa Lucia as respondents, and pleaded a claim predicated upon negligence, that is, Libel No. 27,124, and 27,125, along with the other libels considered herein.

The deceased, Jacques Cardinale, was found by a fellow crewman, Salvadore Romeo, immediately following the explosion lying unconscious on what remained of the deck. The upper part of Cardinale's body was hanging over the edge of the hatch on the fish hold, and a brail was lying over him. Romeo tried to take Cardinale with him as he left the ship. He was not able to do so.

Another seaman, Horace Adagio, was Jacques Cardinale's brother-in-law. He saw the body covered with the brail and debris. Adagio also was unable to rescue him.

The deceased met his death through no negligence of his own, solely because of the unseaworthiness of the Santa Lucia and the joint negligence of the respondents.

Cardinale's body was later recovered, prepared for burial, shipped to his native Algiers for interment, at a total expenditure of \$1,917.23, which has been stipulated was a reasonable charge for these services. A seaman is entitled to be returned to his native land and there buried at the expense of those who caused his death. [25]

Jacques Cardinale at the time of his death was 47 years of age, in apparent good health, and had been privately employed as a fisherman. There was evidence to support a finding that his annual income was \$3,500.00 to \$4,000.00. He was married. There is a widow and two minor children surviving.

The widow, Marie Cardinale, is 42 years of age. The daughter, Francoise Cardinale, is not quite 12 years of age, and his son, Vincent Joseph Cardinale, was seven and one-half years of age when Jacques Cardinale met his death.

The deceased was a good family man who fairly fulfilled his obligations to his family in proportion to their needs. He had been a master fisherman in his native Algiers, working with his brothers on a family fishing boat. He had left for the United States in February, 1954, and it was his intention

to stay in the United States about two years and, if successful, he intended to send for his wife and children.

When he left, he provided some funds for their support, that is, for the support of his family in his absence. Exactly how much, we are not informed, but it was sufficient to take care of their needs. He also had sent about \$650.00 to his wife since February, 1954, and the fishing season was in progress at the time of his death.

I measure the pecuniary loss of his estate at \$1,917.23, the cost of the funeral and burial; to his widow, Marie [26] Cardinale, \$20,000.00; to his daughter, Francoise Noel, \$7,500.00; and to his son, Vincent Joseph Cardinale, \$12,000.00. I award judgment against the respondent owners and Union Oil Company as joint tort feasons in the total amounts of \$41,417.23.

Final decrees may be submitted providing for judgments as indicated heretofore, with taxable costs and disbursements, but without interest.

Frances Cardinale as administratrix of the estate of Frank J. Cardinale, and Idaline Jenner Cardinale have also, as we have heretofore noted, filed a petition for limitation of liability under Section 181, et seq., Title 46 of the United States Code, File No. 27,211.

The fundamental provision of the Limited Liability Act declares: "Liability for any damage arising from any disaster at sea which is occasioned without the privity or knowledge of the ship owner shall in no case exceed the value of the vessel at fault, to-

gether with her impending freight." 46 U.S. Code, Section 183.

Lake Tankers Corporation versus Henn, administratrix, 354 U.S. 147 at page 150, 1957.

We have heretofore found that the disaster was occasioned in part by the personal negligence of Frank J. Cardinale, one of the co-owners of the Santa Lucia, and that the ship was unseaworthy, and that the co-owner, Frank J. Cardinale, [27] was personally in charge of the operation and management of the vessel and was aboard her at the time of the explosion. It was the personal duty of the owners to see that the ship was seaworthy, that its equipment was safe. This duty they failed to perform.

Limitation relief may be obtained only when the negligence causing the disaster occurs without privity or knowledge on the part of the owners. The burden of proof of such absence of privity and knowledge is on the petitioner's onus. The Silver Palm, 94 Fed. 2d 776, Court of Appeals, Ninth Circuit, 1937.

This burden the petitioners have failed to carry. Petition is denied upon the merits, and taxable costs against the petitioners.

A libel in personam was also filed on July 23, 1956, Libel No. 27,364, by Frances E. Cardinale as administratrix and Idaline Jenner Cardinale to recover from the Union Oil Company for the loss of the Santa Lucia.

We have at the outset of this decision referred to this suit. It is libelants' contention that the loss of

the Santa Lucia was occasioned by the negligence of the Union Oil Company. This Court has jurisdiction of the subject matter of this claim. The respondent's negligent acts constitute a maritime tort. We conclude that they do, and that these libelants may therefore have recovery, notwithstanding the [28] fact that the negligence of the libelants themselves contributed to the disaster, and that both libelants and respondents are at fault and both to blame.

The negligent acts of respondents, heretofore found, although committed on the wharf, produced no actionable injury until the Santa Lucia exploded, took fire and sank. As Judge Goodman has written in *Wilson versus Trans-Atlantic Air Lines*, 121 Fed. Sup. 85, page 92:

“Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, or upon the locality where it occurred.”

And he continued later:

“In applying the locality test for admiralty jurisdiction, the tort is deemed to have occurred not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action.”

We, according to the findings heretofore made, conclude that in this suit an interlocutory decree adjudging both to blame and providing for a reference

to a Commission for determination and fixation of damage may be submitted on notice.

It is the Court's intention that the decision now rendered in all these suits shall constitute the findings of fact made by the Court and the conclusions of law based on such [29] findings, and it is so ordered.

Gentlemen, once again I want to thank you for the kindness and courtesy to me, and to tell you that you have made my stay here in this court a very happy and memorable event, and I hope to come back again.

Respondents may have exception to my ruling and, as I advised counsel, they may submit briefs within the next three weeks, and I will hold up the final decree until the first of October.

Thank you, gentlemen.

[Endorsed]: Filed September 19, 1957. [30]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty Nos. 27116 and 27117
(Consolidated)

JOSEPH SALMERI,

Libelant,

vs.

FRANCES E. CARDINALE, Administratrix of
the Estate of FRANK JOSEPH CARDI-
NALE, Also Known as FRANK J. CARDI-
NALE, Deceased; IDALINE JENNER CAR-
DINALE, et al.,

Respondents.

JOSEPH SALMERI,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation; FRANCES E. CARDINALE,
Administratrix of the Estate of FRANK
JOSEPH CARDINALE, Also Known as
FRANK J. CARDINALE, Deceased; IDA-
LINE JENNER CARDINALE, et al.,

Respondents.

FINAL DECREE

The above-entitled cases having come on regularly
to be heard on the 3rd, 4th, 5th, 6th, 9th, 10th, 11th
and 12th days of September, 1957, and the court
having considered the evidence, both oral and docu-
mentary, and the arguments of counsel, and the
cause having been submitted and the court having

made and entered its Findings of Fact and Conclusions of Law, Now, Therefore,

It Is Ordered, Adjudged and Decreed that libelant, Joseph Salmeri, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, the total sum of \$38,308.38.

It Is Further Ordered, Adjudged and Decreed that libelant, Joseph Salmeri, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, his costs involved herein.

Dated: October 4th, 1957.

/s/ SYLVESTER J. RYAN,
United States District Judge.

Approved as to Form and receipt of a copy of the above and foregoing Final Decree is hereby acknowledged this 27th day of September, 1957.

BOYD & TAYLOR,
By /s/ FREDERIC G. NAVE,
/s/ MORTON L. SILVERS,
MORGAN & BEAUZAY,
Proctors for Respondents.

[Endorsed]: Filed October 10, 1957.

[Title of District Court and Cause.]

No. 27117

NOTICE OF APPEAL

Notice Is Hereby Given that Union Oil Company of California, a corporation, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 11, 1957.

Dated: November 6th, 1957.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Attorneys for Appellant, Union Oil Company of
California, a Corporation.

Receipt of copies admitted.

[Endorsed]: Filed Nov. 7, 1957.

[Title of District Court and Cause.]

No. 27117

STIPULATION EXTENDING TIME TO FILE RECORD AND DOCKET APPEAL

It Is Hereby Stipulated and Agreed, by and between the attorneys for the parties hereto, subject to the order of the court, that the time within which respondents-appellants shall file the record on ap-

peal and docket the appeal from judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including January 13, 1958.

Dated: December 12, 1957.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Attorneys for Libelant,
Joseph Salmeri.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Attorneys for Respondents-Appellants, Union Oil
Company of California, a Corporation, et al.

So Ordered: December 12, 1957.

/s/ GEO. B. HARRIS,
United States District Judge.

[Endorsed]: Filed Dec. 16, 1957.

[Title of District Court and Cause.]

No. 27117

ORDER EXTENDING TIME

Upon reading the Affidavit of Frederic G. Nave,
Proctor for Respondent and Appellant, Union Oil

Company of California, a corporation, and for good cause appearing;

It Is Hereby Ordered that the time within which the Respondent-Appellant, Union Oil Company of California, a corporation, shall file the record or appeal and docket the appeal from the judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including February 12, 1958.

Dated: January 13, 1958.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed Jan. 13, 1958.

[Title of District Court and Cause.]

No. 27117

AFFIDAVIT OF FREDERIC G. NAVE

State of California,

City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says:

That he is an attorney and proctor of law duly licensed and admitted in the above-entitled court and is the proctor attorney for the appellant, Union Oil Company of California, a corporation, and makes this affidavit for and on behalf of said appellant, Union Oil Company of California, a cor-

poration; that heretofore on December 12, 1957, pursuant to stipulation and order of this court the time within which the Appellant, Union Oil Company of California, a corporation, should file its record on appeal and docket the appeal from the judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit was extended to and including January 13, 1958; that affiant has consulted with the reporters who are preparing the record and transcripts and has been advised that due to the press of work that the record and transcript is not yet completed and have requested an extension of time of thirty (30) days for such purposes; that affiant did communicate with Attorney John Whelan, of the law firm of Michelson, Whelan & Michelson, of San Francisco, who are the proctors and attorneys for the Libellant-Appellee, and did request the written stipulation consenting to such extension and was advised that while they would not grant a stipulation in writing that they had no objection to a court order granting such extension being entered.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of January, 1958.

/s/ VIRGINIA A. HAMILTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 2, 1960.

[Endorsed]: Filed Jan. 13, 1958.

[Title of District Court and Cause.]

No. 27117

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein:

Libel (Damages for Personal Injuries—
\$100,000.00.)

Answer to Libel.

Answer to Libel in Personam.

Minute Order dated August 5, 1957, consolidating cases for trial.

Findings of Facts, Conclusions of Law and Decision of the Court. (Reporter's Transcript.)

Final Decree.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Stipulation Extending Time to File Record and Docket Appeal.

Order Extending Time.

Affidavit of Frederic G. Nave.

Libelant's Exhibits 1 to 12, inclusive.

Respondents' Exhibits A to W, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of January, A.D. 1958.

C. W. CALBREATH,
Clerk;

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15875. United States Court of Appeals for the Ninth Circuit. Union Oil Company of California, a Corporation, Appellant, vs. Joseph Salmeri, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 16, 1958.

Docketed: February 5, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15875

JOSEPH SALERMI,

Libelant and Appellee,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents and Appellants.

DESIGNATION OF THE CONTENTS
OF RECORD ON APPEAL

Appellant, Union Oil Company of California, a corporation, designates the entire record pursuant to Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, including the Reporter's transcript and all exhibits.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERICK G. NAVE,
Proctors for Appellant, Union Oil Company of
California, a Corporation.

[Endorsed]: Filed Feb. 5, 1958.

[Title of Court of Appeals and Cause.]

No. 15875

APPELLANT'S STATEMENT
OF POINTS ON APPEAL

Appellant, Union Oil Company of California, a corporation, hereby submits its concise statement of points upon which appellant intends to rely in this appeal as follows:

1. The Court erred in finding that the injuries sustained by the libelant were caused or occasioned by negligence of appellant proximately causing or contributing to the explosion of the F/V Santa Lucia.

2. The Court erred in finding that the injuries sustained by the libelant occurred because of fault or negligence on the part of this respondent.

3. The Court erred in not finding that the sole cause of the injuries to the libelant was due to the unseaworthiness of the F/V Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the F/V Santa Lucia.

4. The Court erred in finding that Charles Caldwell, the marine service station employee of appellant, was guilty of negligence contributing to the explosion and fire aboard the F/V Santa Lucia.

5. The Court erred in finding that respondent was guilty of negligence as a joint tortfeasor in this action.

6. The Court erred in finding that the appellant, Union Oil Company of California, was at fault and to blame for the injuries received by the libelant.

7. The Court erred in finding that the respondent, Union Oil Company of California, was jointly at fault and to blame with the co-owners, Frances E. Cardinale, administratrix of the estate of Frank J. Cardinale, and Idaline Jenner Cardinale, the co-owners of the F/V Santa Lucia.

8. The Court erred in failing to find, as a conclusion of law, that the appellant, Union Oil Company of California, was not negligent in any manner contributing to the explosion and fire of the F/V Santa Lucia and resulting injuries to libelant.

9. The Court erred in making findings of fact that Charles Caldwell, an employee of respondent, Union Oil Company of California, was negligent and at fault when he failed to look at the gasoline meter until 58½ gallons had been delivered to the F/V Santa Lucia.

10. The Court erred in its findings of fact that the failure of the said Charles Caldwell, an employee of the Union Oil Company of California, to look at the gasoline meter until 58½ gallons had been delivered, was negligence contributing to or causing the explosion and fire aboard the F/V Santa Lucia and resulting injuries to libelant.

11. The Court erred in making and entering the findings of fact that the respondent, Union Oil

Company of California, was negligent and at fault in not exercising reasonable care or prudence and that its failure so to do was a proximate cause of the explosion and fire on the F/V Santa Lucia and the resulting injuries to libelant.

12. The Court erred in that the findings of fact heretofore mentioned are not supported by any evidence in the trial of said action.

13. The Court erred in that there was no evidence to support its findings of negligence against the said Caldwell or this appellant heretofore specifically mentioned.

14. The Court erred in adopting conclusions of law inconsistent with its findings of facts.

15. The Court properly concluded that the explosion aboard the F/V Santa Lucia was due to an unseaworthiness aboard the Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the ship, but conclusions of law holding appellant, Union Oil Company of California, to be a joint tortfeasor was inconsistent therein.

16. The Court erred in awarding judgment in favor of libelant against this appellant.

17. The Court erred in allowing excessive damages against this appellant.

18. That the amount of damages awarded libelant against this appellant included maintenance and

cure which, under the evidence of this case, should not have been awarded against appellant.

19. That the money judgment awarded appellant was excessive and was not supported by the evidence in this case.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR;

/s/ FREDERIC G. NAVE,
Proctors for Appellant, Union
Oil Company of California.

[Endorsed]: Filed Feb. 5, 1958.

Nos. 15875-76-77-78-79

United States
Court of Appeals

For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JOSEPH SALMERI,

Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

FRANCISCO L. PEDRASAZ,

Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI,

Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI, Administrator of the Estate of
JACQUES CARDINALE, Deceased, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

IDALENE J. CARDINALE and FRANCES E. CARDINALE,
Administratrixes of the Estate of FRANK J. CARDINALE,
Deceased, Appellees.

Transcript of Record **FILED**

In Three Volumes

MAY - 2 1958

Volume III
(Pages 363 to 685)

PAUL P. O'BRIEN, CLERK

Appeals from the United States District Court for the
Northern District of California,
Southern Division.

Nos. 15875-76-77-78-79

United States
Court of Appeals
For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JOSEPH SALMERI, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

FRANCISCO L. PEDRASAZ, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI, Administrator of the Estate of
JACQUES CARDINALE, Deceased, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

IDALENE J. CARDINALE and FRANCES E. CARDINALE,
Administratrixes of the Estate of FRANK J. CARDINALE,
Deceased, Appellees.

Transcript of Record
In Three Volumes
Volume III
(Pages 363 to 685)

Appeals from the United States District Court for the
Northern District of California,
Southern Division.

(Testimony of Charles Herbert Caldwell.)

Q. (By Mr. Vartan): Mr. Caldwell, after the conversation, or after you made the statement which you said you did to the man on the Santa Lucia, I believe you said he didn't answer you?

A. At what time, sir?

Q. When you said, "Looks like you are going to take 58 and a half gallons."

The Court: Looks like you are going to take 60.

The Witness: Yes, sir, that's right.

Q. (By Mr. Vartan): Oh, sixty. Did he reply to that statement? A. No, sir, he did not.

Q. What did he do?

A. He shut off the gas immediately. He took the fill spout out from the deck, he laid it down on the deck and stood up and he talked to another crewman that was right there beside him.

Q. At that time, Mr. Caldwell, did you look at the deck of the Santa Lucia in and about the fill pipe? A. Yes, sir.

Q. Did you notice any overflow of gasoline?

A. No, sir, I did not.

Q. What did the man do then?

A. He spoke to this other crewman in a low voice that I could not hear what they were saying. He then turned around [367] and he walked around the forward end of the cabin to the, probably to the other side of the boat, I couldn't see him any more.

Q. Did he walk slowly or fast?

A. Just average rate.

Q. He didn't appear excited?

A. No, he didn't.

(Testimony of Charles Herbert Caldwell.)

Q. Then what did you do, did you stand there?

A. I stood right in that same spot until he reappeared.

Q. When he reappeared did you have a conversation with him? A. No, sir.

Q. Did you see what, if anything, he did?

A. Well, he reappeared, he had this sounding stick in his hand and I thought he was going to sound his tanks, so I moved down the wharf to a position where I was right above him and I was watching over the side as he prepared to sound his tanks. He raised the stick to the vertical as though he was going to drop it in the tank to measure it, and at that moment the boat exploded.

Q. Mr. Caldwell, from the time that he left the area of the fill pipe and was away and came back with the measuring stick, you stood there, did you not? A. Yes, sir.

Q. And where were you looking as you stood there? [368]

A. I was looking down on the deck.

Q. Of what? A. Of the boat.

Q. You didn't look behind you? A. No, sir.

Q. You didn't look at the meter again?

A. Yes, sir, I did.

Q. What did the meter show then?

A. 58 and a half gallons.

Q. So that we get the order straight, from the time you saw the meter said 58 and a half gallons, then you went over and told the man that, or words to that effect; right? A. Right.

(Testimony of Charles Herbert Caldwell.)

Q. And then you saw the man walk, come back with a stick, right? A. Yes.

Q. Is that when you looked at the meter again?

A. No, sir, I looked at the meter again in his absence.

Q. What did it read?

A. As I said, 58 and a half gallons.

Q. What did the meter say when you first saw it the third time and before you told him about the 58 and a half gallons?

A. I said it was in that neighborhood at that time.

Q. How much time elapsed from the time that you told the man about "Looks like it will take 60," or whatever the words [369] were, and then he left and then you came back to the meter, how much time elapsed?

A. There was little time elapsed at all, he shut it off immediately when I told him.

The Court: How did he shut the gas off?

The Witness: He had control of the loading right at the end of the hose.

The Court: Describe the mechanism of this hose which gave him power to shut the flow of the gas off. Will you describe that?

The Witness: Yes, sir. As he squeezed, closed his hand he could let the gas flow in his tank and if he released his hand the gas would shut off automatically.

The Court: How did that work, what did the hand apply to?

(Testimony of Charles Herbert Caldwell.)

The Witness: To the fill spout, much the same as an automobile service station.

The Court: You had a similar nozzle?

The Witness: Yes, sir.

The Court: Such as we have on the gasoline pumps in the service station?

The Witness: Very similar.

The Court: Where by pressing a lever you commence the flow or permit the flow of the gasoline from the end of the hose or the nozzle? [370]

The Witness: Yes, sir.

The Court: And then by releasing your pressure on that lever the flow is shut off.

The Witness: Correct.

The Court: Now, did you have any means on the dock of controlling the flow of gasoline?

The Witness: Yes, I could shut it off at any time.

The Court: How could you do that?

The Witness: By a quarter turn of this plug valve.

The Court: That was on the deck of the dock?

The Witness: Right by the meter.

The Court: How was this pump operated, you told us by gravity?

The Witness: There was no pump, sir, it is all gravity flow.

The Court: All gravity flow?

The Witness: Yes.

The Court: There is nothing that you turn on then to start the flow outside of opening a valve?

(Testimony of Charles Herbert Caldwell.)

The Witness: That is right.

The Court: Did you open that valve when he came alongside with the Santa Lucia?

The Witness: After he had secured, took the hose aboard, I opened the valves.

The Court: And that permitted the gasoline to go [371] down from your tank on the dock down to the ship.

The Witness: It would go into the ship when he opened his valve on the end of the hose.

Q. (By Mr. Vartan): Mr. Caldwell, after looking at the meter for the first time and noticing it registered in the vicinity of 58 and a half or 60 gallons, that would be the third time you looked at it, did you walk to the edge of the dock before you had the conversation with him about it looks like it will take about 60?

A. It was about a half a step to my right and I would be at the rail.

Q. Well, the meter is six feet back, is it not?

A. Yes, but I wasn't standing right at the meter when I observed it.

Q. That is what I am trying to get at. In other words, the meter you could see as you were standing at the edge of the dock, could you see the face of the meter standing at the edge of the dock?

A. Yes, sir.

Q. All right. So after this conversation whereupon Mr. Cardinale went to get the measuring stick you didn't have to walk to the meter, all you did was turn around and look at it?

(Testimony of Charles Herbert Caldwell.)

A. That's right.

Q. You turned around and looked at the meter and then you turned back facing the vessel and waited there until he got [372] back, didn't you?

A. Yes, sir.

Q. You didn't examine the floor of the dock around the meter or pass the meter on this side of the meter for any gasoline leakage?

A. I had it all within my view.

Q. Is it your testimony that after noticing that the meter read 58 and a half you made a point of examining the flooring of that dock for gasoline leaks?

A. In the area of the meter I could see it all at a glance.

Q. Did you make a specific examination of the floor of the dock after you observed that the meter read 58 and a half gallons?

Mr. Nave: Object to that as argumentative.

The Court: Overruled, he may answer. Do you understand the question?

The Witness: No, sir, I don't.

The Court: Did you, after you observed it was 58 gallons on the meter, registered on the meter, look at the flooring of the dock specifically to determine whether or not any gasoline had flowed over on your dock floor?

The Witness: May I answer it this way?

The Court: You can answer it either yes or no. Did you look at it, did you suspect that might have happened?

(Testimony of Charles Herbert Caldwell.)

The Witness: No, I didn't suspect that [373] might happen, and I didn't see any.

The Court: Did you ever have any trouble with leakage of gasoline on the dock?

The Witness: No, sir.

The Court: At any time while you were working on this dock?

The Witness: No, sir.

The Court: Did you ever have any trouble with leakage from the tank in which the gasoline was stored?

The Witness: No, sir.

The Court: How big was that tank, you say?

The Witness: It was a small tank, I think it held about 2,600 gallons.

The Court: Was it all constructed above the flooring of the dock?

The Witness: It was raised up about fourteen inches above the dock.

The Court: Did part of it protrude below the flooring of the dock?

The Witness: No, sir, it was all above deck.

The Court: It was all above deck. None was cradled beneath?

The Witness: No, sir.

The Court: All right. You say you never had trouble with leakage in it at any time. Did you ever have any [374] leakage in your hose connections or piping there?

The Witness: No, sir.

(Testimony of Charles Herbert Caldwell.)

Q. (By Mr. Vartan): Did you have any trouble with the meter before?

A. We occasionally had trouble with the meters.

Q. What trouble did you have with the meter?

A. Well, occasionally a meter would just stop up and refuse to turn.

Q. And when it would stop up would it leak?

A. No, sir.

Q. You have never seen a meter leak, even a drop? A. No, I haven't.

The Court: What was the construction of the hose that you handed down to the Santa Lucia?

The Witness: It was a reinforced rubber hose. In other words, it was solid to the extent it had a wire around the outside of it.

The Court: What was the diameter of it, do you know?

The Witness: I believe it is an inch and a quarter.

Q. (By Mr. Vartan): Mr. Caldwell, the first sensation that you sensed when this unusual occurrence took place was that everything turned white, isn't that true? A. Yes. [375]

Q. Pardon me? A. Yes, that's right.

Q. Then your sensation was having difficulty holding your balance, being pummeled by falling objects, is that true? A. Yes, that's right.

Q. In that order, the sensation was first everything turned white and then the next sensation was you had difficulty holding your balance, is that true?

A. That followed in that sequence, yes.

(Testimony of Charles Herbert Caldwell.)

Q. Pardon me?

A. They followed in that sequence.

Q. First everything turned white and then you had trouble holding your balance, is that right?

A. May I fill in some more of other things that happened in that same sequence?

The Court: Yes, tell us what happened.

The Witness: I would like to. As I was watching Mr. Cardinale the explosion must have occurred. Everything turned white. I don't recall the explosion, I don't remember a boom or anything. The next thing I remember I was turned around 180 degrees and I was facing the small diesel tank and I had my hands over my eyes, and I had a feeling that I was being pummeled, everything was hitting me and I was rocking from side to side. As I lowered my hands I began to observe the smoke and I realized that there must have been an explosion. [376]

Q. (By Mr. Vartan): Were you finished, Mr. Caldwell? A. That's right.

Q. Then am I correct that you ran towards the main dock, that would be in a southerly direction?

A. No, from that position I observed the falling debris that was hitting me and smaller pieces and larger pieces falling on either side, and my first attempt was to get out of the falling debris, pieces of the boat were coming down all around. And I moved from that position to between the gasoline and diesel tanks to take cover from the debris coming. I then run from there to the center of the railroad tracks

(Testimony of Charles Herbert Caldwell.)

on the approach and made my way toward the office, to the south.

Q. That would be the main office?

A. The main office.

Q. All right. On your way to the main office did you observe the crew of the Santa Lucia getting off of the stern of the Santa Lucia and falling into a large skiff—or pulling a large skiff up?

A. Yes, I did.

Q. At any time, Mr. Caldwell, when you saw the men on the Santa Lucia with the skiff there was no fire around or on the stern of that vessel, isn't that true?

A. I didn't observe any.

Q. You received flash burns on your face, did you not? [377]

A. Yes, sir.

Q. Mr. Caldwell, let me ask you if someone tied up to your fueling station and asked for thirty gallons of gasoline, was it not your duty to see that he got thirty gallons of gasoline?

A. Yes, sir.

Q. Well, now, if someone tied up to the gas dock and asked for about thirty gallons of gasoline, or approximately thirty gallons of gasoline, it would be your duty to inform him when approximately thirty gallons of gasoline had been delivered?

The Court: Counsel, I don't know what the purpose of this questioning is. If you mean it is part of his duty in respect to his employer, that's one question; you may ask whether he was so instructed and whether according to the rules of his company—

Mr. Vartan: Oh, I see.

The Court: But as to whether or not there was,

(Testimony of Charles Herbert Caldwell.)

under the circumstances, a duty which he owed to the Santa Lucia——

Mr. Vartan: I get it.

The Court: ——is a matter of law for the Court to determine, not for this witness to give his opinion on.

Mr. Vartan: Yes, your Honor.

The Court: Even though it may be very helpful. I don't know. [378]

Mr. Vartan: Very well, your Honor.

The Court: You may ask him what his instructions were with respect to this matter from his company, you may ask him what his practice was.

Mr. Vartan: All right. Well, we will start over so that we——

The Court: When you speak of duty, you speak of legal obligations.

Mr. Vartan: Yes, I realize that, your Honor. Thank you. [378-A]

Q. (By Mr. Vartan): Mr. Caldwell, I would like to ask you a few questions over again in accordance with his Honor's suggestion incorporated.

Did your employer instruct you, prior to the day of this accident that if somebody tied up at the fueling station and asked for 30 gallons of gasoline that you were to see that he was to get 30 gallons of gasoline? A. More or less, yes.

Q. Did your company instruct you prior to the day of this accident that if somebody came up and asked for approximately or about 30 gallons of gasoline, that you should inform the customer when

(Testimony of Charles Herbert Caldwell.)

approximately or about 30 gallons of gasoline had been delivered? A. No, sir.

The Court: You were instructed to sell as many gallons of gasoline as you could get paid for or the company could collect for?

The Witness: We were to deliver whatever they wanted with their instructions.

Q. (By Mr. Vartan): Now, calling your attention to the same deposition, page 35, line 7:

“Question: Sure. Isn’t it correct that part of your duties at the time we are talking [379] about where someone asked for approximately 30 gallons of gas, to inform him when the approximately 30 gallons of gas had been delivered?

“Answer: If he asked for it in that respect, yes, I would. In this case, he didn’t.”

Now, did you give that answer to that question?

A. I believe that is correct, I said that, and I also clarified myself later on, in the deposition.

Q. Your attorney will call your attention, I am sure, to any clarification. But I want to know now if it isn’t a fact that your instructions and your custom and habit on that dock was that if a customer asked for approximately 30 gallons of gasoline, it was your duty to inform him when the approximately 30 gallons had been delivered?

Mr. Nave: Object to that, if the Court please——

Mr. Vartan: That is the crux of our case, your Honor.

(Testimony of Charles Herbert Caldwell.)

The Court: That may be the crux of it, that is your legal contention.

Mr. Vartan: No, I mean counsel objects—I am sorry, I withdraw my remarks.

Mr. Nave: Calling for a conclusion of the witness.

The Court: Objection sustained.

Now, you may ask him that question, since this is an admiralty suit, so that you may have it on the record in the [380] event there is an appeal to the appellate court, so they may have the answer on the record; be no need for a new trial.

Mr. Vartan: Yes. I think, your Honor, that we already covered the subject by reading his answer in the deposition, but following your Honor's suggestion:

Q. (By Mr. Vartan): I will ask you, Mr. Caldwell, if it isn't true that on the day in question, that part of your duties under the instructions of your company was that where someone asked for approximately or about 30 gallons of gas, to inform the customer when approximately or about 30 gallons of gas had been delivered. Wasn't it your duty to tell them? A. No, sir, it was not.

Q. Then the answer which you gave in your deposition is not true?

Mr. Nave: Objected to——

The Court: Objection sustained.

Mr. Nave: Being argumentative.

Q. (By Mr. Vartan): Would you like to correct your answer given in your deposition?

(Testimony of Charles Herbert Caldwell.)

The Court: Objection sustained, the Court's own objection.

Q. (By Mr. Vartan): Did you, Mr. Caldwell, in this instance, advise Mr. [381] Cardinale, the customer, that he had taken approximately 30 gallons of gasoline when the meter read approximately 30 gallons? A. No, sir.

Mr. Vartan: Your Honor, may we have a recess at this point?

The Court: Yes, how long do you want?

Mr. Vartan: Ten minutes.

The Court: All right. A ten-minute recess.

(Short recess.)

The Court: All right.

Mr. Vartan: I don't have too many questions.

The Court: Take as long as you want, counsel.

Mr. Vartan: I don't want to disconcert your Honor.

The Court: A very important witness.

Q. (By Mr. Vartan): Mr. Caldwell, you knew from training by the company and your experience that introducing gasoline beyond the capacity of a tank involved a hazard, did you not?

A. Yes, sir.

Q. You knew that introducing gasoline beyond the capacity of a tank would be a fire hazard, did you not?

Mr. Nave: Object to that as being argumentative.

Mr. Vartan: I am asking for his knowledge.

(Testimony of Charles Herbert Caldwell.)

The Court: Overruled. You may answer.

Q. (By Mr. Vartan): [382] Did you not?

A. If he had spillage on the deck, yes, it would be a fire hazard.

The Court: Did you know the capacity of this tank?

The Witness: No, sir.

Q. (By Mr. Vartan): Mr. Caldwell, earlier in my examination, didn't you say that Mr. Cardinale told you that she will take 30 gallons?

A. No, sir, I did not.

Q. Well, reading from the statement——

The Court: There is such a statement in there, but you see, counsel, you put a construction on that that doesn't necessarily follow. Because a tank will take 30 gallons, doesn't mean that is the capacity of the tank. I may have a bigger tank; I may drive up to a gasoline station with my car and say I will take five, maybe because that's all the money I have in my pocket to pay for it at that moment.

Mr. Vartan: Well, may I ask the witness, your Honor?

The Court: Certainly, go ahead.

Q. (By Mr. Vartan): I will read from your statement.

"He replied that she will take about 30 gallons." Did he make that statement to you that "She will take about 30 gallons"? A. Yes, sir. [383]

Mr. Nave: Objected to as asked and answered.

The Court: He has answered it.

Mr. Vartan: He has denied it.

(Testimony of Charles Herbert Caldwell.)

The Court: Did you make that statement?

The Witness: Yes, sir, I did.

The Court: In writing.

Q. (By Mr. Vartan): Now, in addition to the hazards that you have just testified to, introducing more gasoline than the capacity of the tank you knew could rupture a tank, didn't you?

A. No, sir, I did not.

Q. Calling your attention, counsel, to page 50, line 14—I will have to go back to the question, Mr. Nave, page 49, line 26:

“And you knew that there were certain hazards involved in introducing gasoline beyond the capacity of the tank to receive it, isn't that right?”

Down to line 14:

“What would the hazard be?

“Answer: Fire hazard, rupturing the tank.”

Did you give that answer to that question?

A. Yes, sir, I did. I also clarified that statement later in my deposition.

Q. Well, Mr. Nave will call that to your attention, I am [384] sure.

And you also knew on this day that another hazard from the same practice would be an explosion, or could be an explosion, did you not?

A. It's possible.

Q. Mr. Caldwell, you also sold diesel oil from this gasoline dock, did you not? A. Yes, sir.

Q. Did you personally handle those sales?

A. Yes, sir.

(Testimony of Charles Herbert Caldwell.)

Q. Those sales of diesel oil were also made to fishing vessels? A. Correct.

Q. I assume, Mr. Caldwell, that separate hoses were involved for diesel? A. Yes, sir.

Q. And I assume the same type of nozzle was involved? A. Yes, sir.

Q. In other words, the same nozzle that was on this gas hose that was used here, was used for the diesel, isn't that right? A. No, sir.

Q. I thought you just said yes, sir.

A. You said the same nozzle.

Q. No, the same type, I'm sorry. [385]

A. The same type, yes.

Q. The same type as far as operation is concerned of the nozzle, isn't that right?

A. Yes.

Q. And in answer to his Honor's question, you said that the type of nozzle that was involved on the gas hose was the kind that you hold your hand to press the handle and the liquid would flow?

A. Right; correct.

Q. He could release the handle, the flow would stop, is that right? A. Yes, sir.

Q. And that handle was on a spring, was it not? In other words, it was a spring action?

A. It was spring loaded.

Q. All right. Mr. Caldwell, fishing vessels would carry diesel fuel tanks up to 3,000 gallons, would they not, fishing vessels that you had sold to?

A. Yes, I have sold up to that capacity.

(Testimony of Charles Herbert Caldwell.)

Q. That has been on many occasions that you have sold diesel fuel to fishing vessels up to 3,000-gallon capacity tanks? Is that right?

A. Let's say some occasions.

Q. Some occasions. All right. Did the diesel delivery on that gas dock also involve gravity [386] flow?

A. Yes, sir.

Q. Does diesel fuel flow faster or slower than gasoline?

A. As to our landing, it flows faster.

Q. It flows faster. How many times faster, just your best judgment?

Mr. Nave: Object to that as being immaterial.

The Court: I don't know. I suppose he has a purpose in it.

Mr. Vartan: I have a purpose.

The Court: Objection overruled.

The Witness: Possibly twice as fast.

Q. (By Mr. Vartan): All right.

A. I don't know.

Q. Now, you have testified earlier that 30 gallons of gasoline, the delivery of 30 gallons of gasoline would involve five to ten minutes, depending on the supply in the storage tank, isn't that right?

A. That's right.

Q. Is it your testimony, Mr. Caldwell, that in delivering diesel, 3,000 gallons of diesel fuel, that a man would stand at this nozzle, the same type as the gasoline nozzle, hold his hand compressed, while 3,000 gallons of diesel fuel were being delivered?

A. It's possible. [387]

(Testimony of Charles Herbert Caldwell.)

Q. What was the practice? Does that happen at your gas dock?

Mr. Nave: If the Court please, I fail to see the relevancy, and I object as immaterial.

The Court: Overruled.

Q. (By Mr. Vartan): Please answer.

A. Yes, it was.

Q. Now, if 30 gallons of gasoline took five to ten minutes, and the diesel flowed twice as fast, then it would take two and a half—ten minutes for 30 gallons, 3,000 gallons would take some hours to deliver, wouldn't it?

The Court: That is a question of mathematics; don't you think I am competent to solve my own mathematical problems, if it becomes necessary to do so?

Mr. Vartan: Very well.

Q. (By Mr. Vartan): How long would it take to deliver 3,000 gallons of diesel fuel ordinarily?

The Court: I don't see how this is material, counsel.

Mr. Vartan: Your Honor——

The Court: I am giving you considerable leeway, but no claim has been made that diesel was purchased or delivered to this vessel. [388]

Mr. Vartan: May I state my position, your Honor?

The Court: If you feel you have something definite in this, go ahead. I don't want you to disclose your purpose, because sometimes compelling you to

(Testimony of Charles Herbert Caldwell.)

do that in the course of examination, defeats the very purpose you have in mind.

Go ahead.

Q. (By Mr. Vartan): How long would it take ordinarily to deliver 3,000 gallons of diesel fuel at that sales dock?

A. It has been several years since I worked there now, but it was in excess of an hour.

Q. Excess of an hour. And during the delivery that took one hour, using the same type of nozzle, the type that you have to hold your hand up, is it your testimony that the man on the vessel would stand there for one hour and hold his hand compressed while taking one-hour's delivery of diesel?

A. Yes.

Q. Is it your testimony that the nozzle was never locked into place at the sales dock during such a long delivery of gasoline—I mean of diesel?

A. I never locked the nozzle open, no.

Q. Did you ever observe the fishing men down on the deck do that?

A. I have observed fishermen doing it, yes.

Q. As a matter of fact, that was a common practice during [389] the time that you worked there, that when there was going to be a delivery of fuel which would last an hour or two, even, that they would lock the nozzle and walk away and they wouldn't stay there and hold their hand with their muscles compressed for one hour, would they?

The Court: I don't see what that has to do with this case?

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: Well, I will tell you, your Honor.

The Court: I know, but if you have any evidence that this man Cardinale tied this lever down and walked away and let the gas flow, produce some witnesses.

Mr. Vartan: Unfortunately——

The Court: We have no witness to that effect?

Mr. Vartan: That's right, your Honor. We are dealing here with a situation where——

The Court: We are dealing here with a case where you are depending upon circumstantial evidence.

Mr. Vartan: That's right.

The Court: But proof of circumstances doesn't mean conjectures based upon the operation of the imagination.

Mr. Vartan: No, that's right, your Honor. The point we make, your Honor, is there is a claim here, which, frankly, to the Court, and representing these seamen, we seriously doubt. There is a nozzle here of the type they mentioned, that had to be held tight against the spring pressure [390] —all right, now——

The Court: Go ahead. I will give you great leeway in going into this, but if you have any testimony or have anything that bears upon the type of nozzle that was used here, please bring it in.

Mr. Vartan: All we can do is show all the circumstances we know.

The Court: All right. You go ahead, then, and take your time.

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: All right.

Q. (By Mr. Vartan): Then from past experience you do know that in some cases the men on the vessel at the other end of the hose would lock the nozzle and wouldn't have to hold it during the fueling operation. You did know that?

A. That is what I said, yes.

Q. All right. Then after a minute or two of conversation with Mr. Cardinale, you didn't see whether he remained at this fill pipe constantly or not; you don't know that, do you, of your own knowledge?

A. To the best of my ability, I believe he stayed at the fill spout the full time. I saw him there several times.

Mr. Vartan: I make a motion to strike that as nonresponsive.

The Court: I think it is responsive. He says he [391] saw him there several times and he believes he stayed there, based upon his observation.

Mr. Vartan: All right.

Q. (By Mr. Vartan): Now, in answer to his Honor's questions about your previous experience in selling gasoline to fishing vessels, is it your testimony that you sold gasoline to fishing vessels on previous occasions, as you told his Honor?

A. Yes, sir.

Q. Page 23-A, line 20, counsel.

"Question: Have you, on occasions in the past, given gasoline fuel to fishing vessels of the same type of the Santa Lucia?

(Testimony of Charles Herbert Caldwell.)

“Answer: I don’t remember that. Mostly they were diesel-powered boats and they would require diesel fuel.”

Did you give that answer to that question? Yes or no, please.

A. The answer is yes. May I qualify it?

Q. Yes.

A. Many times these vessels, if they wanted gasoline, would come over in a skiff or some other means and get five gallons of gas. And in that respect I have given them gas before. On occasions I have given a small quantity of gas, maybe five gallons, if they took on a hundred or two hundred gallons of diesel. [392]

Q. Had you ever given gasoline fuel in the manner that was done in this case to fishing vessels of the type of the Santa Lucia, prior to September 28, 1954?

A. I don’t recall that.

Q. You don’t recall? A. No.

Q. So when you answered his Honor’s question that some gasoline tanks were 100 and some were 200, you had no experience to base that on, isn’t that true?

A. Your question is confusing.

Q. Well, you tell us in what respect it is confusing.

A. As I told his Honor, there are many types of boats and that is what we were speaking of, and some of them could carry, as an auxiliary engine, could carry 100 gallons of gasoline. I had no idea what this vessel carried, or its capacity.

(Testimony of Charles Herbert Caldwell.)

Q. Well, I will ask you again: Prior to September 28, 1954, you don't remember delivering gasoline to a fishing vessel, any fishing vessel, of the type of the Santa Lucia, do you?

A. Very little, if any, yes.

Q. So when you were talking about 100 gallons, 200 gallons, depending upon the type of fish they were going for, you were not basing that on any previous experience, were you, Mr. Caldwell?

A. Yes, sir, I was.

Mr. Nave: Your Honor, I object to that.

The Court: Overruled. [393]

Mr. Vartan: Well, he answered. I have no further questions.

Cross-Examination

By Mr. Nave:

Q. Mr. Caldwell, counsel has read a portion of your deposition that was taken by them on September 23, 1955. I am going to read you some additional questions that were asked you and some additional answers that you gave that were not read to you by counsel, and ask you to state whether or not these questions were asked you and you gave these answers.

Counsel ask you, on page 48, the question he read to you, and the answer which you gave as follows:

“Well, you knew, on the basis of your past experience, that the custom was to request gasoline for an auxiliary tank enough to fill the tank, isn't that correct?”

(Testimony of Charles Herbert Caldwell.)

You said, "Well, yes, he would request enough to fill his tank."

I will ask you, then, if the following questions and answers following that were not asked.

"Question: You knew this on the basis of your past experience and custom there, is that a fair statement?

"Answer: Well, the man usually estimates what he thinks he is going to take. Now, this quite often varies for various reasons." [394]

Did you make that answer to that question?

A. Yes, sir.

Q. The next question:

"Question: That is right, it varies, for one thing, according to the capacity of the tank."

You answered:

"And whatever lines he may have left open as to filling other tanks. If the man says he wanted exactly 30, I would have shut him off at 30, but where he didn't, I went about my business, expecting him to shut his own tank off when he was full."

You gave that answer, didn't you, Mr. Caldwell?

A. Yes, sir.

Q. Page 51 of this deposition, Mr. Caldwell, these questions and answers in your deposition, I will ask you if you answered these questions as follows:

"Question: Mr. Caldwell, what normally happens if someone overfills a tank, it is spilled off the top of the tank, doesn't it?

"Answer: A tank properly installed will over-

(Testimony of Charles Herbert Caldwell.)

flow the tank and show signs of spilling on the deck”

You gave that answer, did you, sir? [395]

A. Yes, sir.

“That would be the normal thing that would happen?”

“Answer: That would be the time to be aware of a fire hazard.”

You gave that answer to that question?

A. Yes, I did.

“Question: And you testified, I believe, if I am correct, that there was no spillage on the deck in question?”

“Answer: No spillage.”

That question was asked and you gave that answer? A. Yes, sir.

Q. And the question following that:

“Question: No gasoline dropped on the deck?”

You answered: “No, sir.”

That’s correct, isn’t it, sir?

A. Yes, it is.

Q. On page 43, counsel, beginning on line 6, counsel asked you these questions and you gave these answers at this deposition:

“Question: Now, you were not acquainted, as I understand your testimony, with whether or not the Santa Lucia had two or more gasoline tanks aboard?”

To which you answered: [396]

“I have no idea of how many tanks she had.”

That’s your testimony? A. That is true.

(Testimony of Charles Herbert Caldwell.)

“Question: You are not acquainted with whether or not there was an overflow on any of the gasoline tanks aboard?”

You answered: “I saw no gas spilled at all.”

A. That’s true.

Q. That’s your testimony?

“Question: And you were not acquainted with whether or not there was a flow pipe between two or more tanks in the vessel in question?”

To which you answered: “No, sir, I don’t know if she had more tanks than one or not.”

Is that your answer, sir? A. Yes, it is.

Q. And following that there is a question:

“Question: Now, in reference to the amount of storage capacity on these various vessels of the approximate size of the Santa Lucia as to Diesel fuel, what range in gallonage was customary in vessels of that size as to Diesel fuel storage?”

To which you answered: “Oh, they may, I have filled them as much as 1500, 1800 gallons. I imagine they will hold up between two or three thousand gallons.” [397] You gave that answer to that question, sir? A. Yes, it is.

Q. Next question following that:

“Question: Now, when a vessel comes into this sales dock for the purpose of taking on fuel, is it your practice to rely on the man who is fueling the vessel with the hand hose to turn it off and on and off at the point of delivery, is that not true?”

Mr. Vartan: Just a minute, we will object to

(Testimony of Charles Herbert Caldwell.)

that. On a lot of these questions it is hard to determine——

The Court: Yes, the objection is sustained. What his practice was—he might have been consistently negligent. It is immaterial.

Mr. Nave: Do I understand, your Honor, that——

The Court: I don't say that he was negligent. It impresses me as I have indicated, a very truthful, sincere, honest young man.

Mr. Nave: Yes. What I mean, your Honor is there an objection to me reading a particular question and answer?

The Court: He objects to this as being immaterial.

Mr. Nave: Oh, being immaterial. I see, your Honor.

The Court: That is the essential objection, isn't it, counsel?

Mr. Bartan: Yes, your Honor. What his [398] practice was is certainly not binding on the seamen.

The Court: Unless it was his practice with this same man.

Mr. Vartan: That's right.

Mr. Nave: Very well.

The Court: He says he doesn't remember—as I recall your testimony, you don't remember servicing this ship before at all, do you?

The Witness: Not for gasoline.

The Court: Not for gasoline.

Q. (By Mr. Nave): Now, on page 46, I will ask

(Testimony of Charles Herbert Caldwell.)

you if these questions and answers were not in your deposition.

“Question:” —beginning on line 20—“You were not concerned whether it is a cash sale or not, it is your custom, is it not, to rely on that person to determine the amount of fuel he wants by regulating himself at the point of a hand control on the vessel?”

Mr. Vartan: Same objection, your Honor.

The Court: Sustained. It is immaterial.

Mr. Nave: On page 47.

The Court: You can show that that is the general custom in the trade and recognized way of doing this, throughout that area. That is another [399] point.

Mr. Nave: The purpose of this, your Honor, was they read excerpts from the deposition and this is an explanation of the answers he was giving. That is the only purpose of this line of inquiry.

The Court: If that is the only purpose, the objection is sustained.

Q. (By Mr. Nave): Mr. Caldwell, do you smoke? A. No, sir.

Q. Did you ever smoke, use cigarettes or tobacco?

A. Today, no, sir.

Q. Did you use it at the time you were working at Union Oil? A. No, sir.

The Court: Did you observe anybody aboard the ship smoking?

The Witness: No, sir, I did not.

The Court: Did you observe anybody on the dock

(Testimony of Charles Herbert Caldwell.)
smoking at the time you were loading or unloading gasoline?

The Witness: I was the only one on the dock in that area.

The Court: Did you observe any odor of cooking coming from the vessel?

The Witness: No, sir.

The Court: All right. [400]

Q. (By Mr. Nave): Mr. Caldwell, I hand you a gasoline hose and nozzle which is in evidence in another case in which you testified. Now, I will ask you first if you will state whether or not this hose that is on this nozzle is the same type and kind of gasoline hose that was used on the hose reel on the day of this explosion?

A. Yes, sir, that looks similar.

Q. I will ask you to examine the nozzle, the fill nozzle, and the lever on the same, and will you state whether or not this is representative of the type of nozzle and control that was being used on the day of the filling of this fishing boat?

Mr. Vartan: Just a minute. We will object to that, your Honor, as——

The Court: Overruled; he may answer.

The Witness: This is similar with one exception

Q. (By Mr. Nave): All right, what is the exception?

A. The one we used on that day had a changeable tip on the end of it; you can either put on a large spout or a small one. It was threaded.

(Testimony of Charles Herbert Caldwell.)

The Court: Outside of that one difference, is this apparatus you hold in your hand now similar in design and construction and size, relative size, as the nozzle at the end of the hose that you handed down to the ship?

The Witness: Very similar, yes, sir. [401]

Q. (By Mr. Nave): Now, the mechanism there——

The Court: Do you offer it in evidence?

Mr. Nave: Yes, your Honor.

Mr. Silvers: May I have a question on voir dire, your Honor, before ruling on that?

The Court: Yes.

Voir Dire Examination

Mr. Silvers: You stated that the hose, as distinguished from the nozzle, was similar to the one that was used in our case. Is it different in any respect?

The Witness: To my knowledge, it is not different at all.

The Court: You mean from your observation?

The Witness: My observations.

Mr. Silvers: Didn't you speak about a wire?

The Witness: Yes, sir.

Mr. Silvers: With relation to the hose that was actually used at the time of this accident?

The Witness: I was referring to the wires you can see on the end there, the reinforcing wire.

Mr. Silvers: You mean right here?

(Testimony of Charles Herbert Caldwell.)

The Witness: Yes, sir.

Mr. Silvers: That is the wire you had reference to?

The Witness: Yes, sir.

The Court: That is woven into the fabric of the [402] hose itself?

The Witness: Correct.

Mr. Silvers: The spring mechanism of the nozzle part of the apparatus you cannot distinguish in any important respect from the one that was on the gas hose now, is that correct?

The Witness: From all appearances, it is the same.

Mr. Silvers: I have no further questions.

The Court: We will receive this article in evidence solely for the purpose of illustration, to demonstrate the mechanism in a general way to the Court.

Mr. Vartan: On behalf of the seamen, the Libelants here, we wish the record to show the objection to this nozzle upon the grounds it isn't the best evidence. This being a seamen's case, if I get out of line, your Honor, I want you to tell me, but I am going to speak frankly——

The Court: You go ahead and don't worry about getting out of line. You have the objection you feel is necessary for the protection of your clients' interests.

Mr. Vartan: All right.

The Court: And make no apologies for doing so

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: All right.

The Court: I would be very much offended if you refrained from doing it.

Mr. Vartan: Very well, your Honor. Our objection [403] is your Honor, that the record in this case will show that a diver was hired by these people while my clients, or our clients were in the hospital, within hours. We will show that eventually the record will show in this case, we don't want this thing to come in now and suffer later, that the water depth right off the gas dock is not too deep. There was a fire, of course, and the hose probably burned, and this gadget, the nozzle, would fall right smack under the gas reel and could be found and brought into court.

Upon that reason, it is not the best evidence and no foundation has been laid to bring this in and say it is the same type and just slough it off. We object on behalf of the crewmen.

Mr. Nave: I would like the record to show, if your Honor please, that I resent the imputations of counsel that we have something in our possession that is not produced here. We do not. I will make the avowal that we do not have in our possession any hose or nozzle that was recovered after this fire at all, and none such is in the possession of my clients or known to me. I think it is a very unfair statement, your Honor, and I certainly——

The Court: I don't think counsel intends to reflect upon your integrity.

Mr. Vartan: No.

(Testimony of Charles Herbert Caldwell.)

The Court: However, the objection is [404] overruled. The Court understands this is not the identical nozzle that was used at the time of the delivery of the gasoline to the ship, in truth, but it is received only for purposes of demonstration, to illustrate to the Court the type, the general type of nozzle then used.

The objection is overruled. You will have an exception to my ruling.

I will now interrogate you specifically, Mr. Nave.

Was the original nozzle recovered by your clients, to your knowledge?

Mr. Nave: To my knowledge it was not, your Honor.

The Court: I have a question to ask you, sir. Did you make an application for the production of anything recovered by the divers from the waters around the dock?

Mr. Vartan: No, your Honor, for the reason——

The Court: Did you at any time examine or take the deposition of any of the officers of this defendant corporation to ascertain whether or not the original nozzle was secured?

Mr. Vartan: Depositions were taken and statements from an employee of Union Oil Company was furnished to us which states that a diver had been employed, but stated that the diving took place at a place other than under the hose reel where this original nozzle would be found. That's our position.

The Court: Do you want to bring the diver in here [405] as a witness to the Court?

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: Well, I don't feel that it is our——

The Court: I say, do you? If you do, I will require the Respondent to give you the name and address of the diver.

Mr. Vartan: Yes, we would like that on rebuttal.

Mr. Nave: I would be very pleased to get the name.

Do you have the name of the diver, Mr. Hill? Will you give counsel the name and address of the diver?

Mr. Vartan: He is their employee; I assume they will produce him.

The Court: If he is in the employ of the company, you will produce him, of course.

Mr. Nave: I don't believe he is a man in the employ of our company. It is my understanding that following this, a diver, an independent person, was asked to go down and see if they could salvage something, and he was unable to find anything, and he didn't salvage anything. Now, this man is not a Union Oil employee, as the counsel has inferred, as I understand it.

The Court: Let's proceed now. Any further questions of this witness?

Mr. Nave: Yes, your Honor.

(Testimony of Charles Herbert Caldwell.)

Cross-Examination

(Continued)

By Mr. Nave:

Q. Now this mechanism, Mr. Caldwell, to turn on the flow [406] of gasoline at this end, you depress the lever or pull the lever up? A. Yes, sir.

Q. Is that right? A. That's correct.

Q. And when you release it, what happens?

A. It closes itself.

Q. And no more gasoline flows out?

A. That's correct.

Q. Now, the nozzle, the actual nozzle that was used in the fueling operation on the Santa Lucia by Mr. Cardinale, is similar as to metal and general design as the one we have in our hand here?

A. Yes, sir, it is.

Q. There is a difference, you stated, I believe, that there was a thread, so that it could be changed as to size of the nozzles? A. Correct.

Q. How about the size of this particular nozzle that is on this exhibit, is that larger or smaller than the one used in the fueling operation?

A. The one we were using that day was smaller.

Q. Do you know the approximate size of the one that was used that day?

A. Oh, half inch, five-eighths of an inch inside diameter. [407]

Q. Now, Mr. Caldwell, before this explosion, did you at any time see any fire anywhere on this dock?

A. No, sir.

(Testimony of Charles Herbert Caldwell.)

Q. Did you before this explosion at any time see any gasoline on your dock running loose or flowing or dripping? A. No, sir.

Q. Did you at any time before this explosion see any fire aboard the fishing boat Santa Lucia?

A. No, sir.

Q. Did you before this accident, explosion, rather, at any time see any spillage of gasoline on the deck of the fishing boat Santa Lucia?

A. No, sir, I did not.

Q. Now, in the equipment in the office on the service station of the Union Oil Terminal there, there are electric wires, are there not?

A. Yes, sir.

Q. And those electric wires are—how are they encased, if they are incased?

A. All wire is run in conduit.

Q. I believe you have testified, on the examination of counsel, that you know of no leakage or spillage of fuel or gasoline at any time, not only on the occasion of this explosion, but prior thereto, on the marine service dock?

A. No, sir, I know of none. [408]

Q. Now, when you left the rail after you told the Court that you had this sudden flash in your face, did you receive any injuries yourself as a result of that explosion? A. Yes, sir.

Q. Will you tell the Court just what happened to you in the explosion, flash and explosion?

A. Well, my eyes were stinging very much, my hair was burnt back, I had a flash burn about my

(Testimony of Charles Herbert Caldwell.)

face, bruises, I was pretty well shaken up, state of shock.

Q. At the moment of the flash, where were you facing?

A. I was looking at Mr. Cardinale on the deck of his boat.

Q. Now, after the explosion, the flash and explosion, did you examine yourself, your face, or any part of yourself, to see if there were any material, any debris imbedded in your hair or your face at any place?

A. Yes, there was quite a bit of some black substance imbedded in my hair, and in my eyes, and my face appeared like it was peppered with a shotgun, little pieces of tar buried in my skin.

Q. You stated that following this flash, as you were facing Mr. Cardinale, that you had the sensation of debris falling on you?

A. Yes, sir.

Q. Is that right, sir?

A. Yes, sir. [409]

Q. Were you able to ascertain what type of debris was falling on you at that time, following the explosion?

A. They appeared to be pieces of the boat were coming down. I noticed one large piece that came down on the opposite side of the wharf from where I was standing.

Q. Now, Mr. Caldwell, the marine dock side—you can just turn around here, if you will, please, and call your attention to a photograph that is marked Respondent's Exhibit B, the picture that

(Testimony of Charles Herbert Caldwell.)

was taken following this explosion of the marine service station, the piling side there.

I call your attention to two objects on the side of the deck, or dock here, that appear to be some type of signs. A. Yes, sir.

Q. Do you know what those signs are, what they were, what they represent?

A. One had instructions for tieing up and the other one had a warning to customers to shut off their engines and turn out all open lights, no smoking.

Q. Were those signs in place as shown on this exhibit, Respondent's Exhibit B, at the time that Mr. Cardinale and the fishing boat Santa Lucia came in to purchase the gasoline?

A. Yes, sir, they were.

Q. Now, following the flash explosion, you left the scene of the explosion, did you not? [410]

A. Yes, sir.

Q. Where did you go immediately after leaving the service station area?

A. I made my way south down the wharf to the foreman's office.

Q. Now, on your way to the foreman's office, did you encounter a young man named Garrett Ray? A. I don't know, sir.

Q. You don't recall. You don't remember whether you talked to anyone or saw anyone, or not, is that right?

A. I saw two men coming up from the launch, from our launch landing, and they appeared to be

(Testimony of Charles Herbert Caldwell.)

all wet. I can remember that as I passed them. I next met Mr. Johnson, the wharf foreman, and I met him about where the tanker Lompoc was tied up.

Q. That is back in the area of the change room or office as shown on the sketch, shown on that map?

A. In this area here (indicating on map).

Q. Before you get on the south end of the dock here, the dock widens out in the area where the Lompoc was berthed, is that right?

A. Yes, that is the main dock.

Q. Now, following your going to that point, did you remain in the area, or did you leave the area?

A. I continued on south to the office and I heard Mr. Johnson—— [411]

Q. You don't have to recite any conversation, just what did you do?

A. I went to the foreman's office and called the engineer at Avila station.

Q. Then where did you go after that?

A. Then I returned down to the wharf, to the scene of the fire, and tried to help some of the fire fighters unreel some hoses. And I realized I was in such a state of shock, I couldn't help them, and I wasn't any use to myself. So I asked Mr. Johnson's permission to go through the fire area and continue on down the wharf, which he told me I could.

And I ran through the fire area and on down the other end of the wharf.

(Testimony of Charles Herbert Caldwell.)

Mr. Nave: I have no further questions at this time, your Honor.

The Court: That may go in evidence.

The Clerk: Union Oil Company's Exhibit J introduced and filed into evidence.

(Whereupon, the hose and nozzle previously referred to was received in evidence as Respondent Union Oil Company's Exhibit J.)

Cross-Examination

By Mr. Silvers:

Q. Mr. Caldwell, I am going to show you a number of photographs which you have seen before, I believe, and I would like [412] to ask you if they represent correctly the scenes of the gas dock following this explosion, with several showing close-ups of the pilings on the side and under the deck of the dock. Would you look at them, please, and see if that is what they represent?

A. All right.

Q. Is that what they represent?

A. Some of them do, yes.

Q. Well, is there any photograph here that does not represent a scene of the gas dock after the explosion or a close-up of the pilings after the explosions?

A. You said planking and pilings; this is obviously just the wreckage of the gas dock.

The Court: Are they photographs of the dock and vicinity?

The Witness: Yes, they are.

(Testimony of Charles Herbert Caldwell.)

The Court: Following the explosion.

The Witness: Yes, sir.

Mr. Silvers: May we offer these in evidence, your Honor?

The Court: Any objections?

Mr. Silvers: As Respondent Cardinale's next in order.

Mr. Nave: I have no objection, your Honor.

The Court: Received in evidence. [413]

The Court: Respondent Cardinale's Exhibit K introduced and filed into evidence.

(Whereupon, the photographs previously referred to were received in evidence as Respondent Cardinale's Exhibit K.)

Q. (By Mr. Silvers): We have made reference to the statement which you signed, Mr. Caldwell, which is in evidence as Libelant's Exhibit—I don't know the number offhand—do you have that, your Honor?

The Court: Libelant's Exhibit No. 11.

Mr. Silvers: I have copies of it.

Q. (By Mr. Silvers): I notice that your signature on that document is dated November 3, 1954, this accident occurring on September 28, 1954. Did you sign this on November 3, 1954?

A. Yes, sir.

Q. Did you sign this in the presence of Mr. Hill, the fire supervisor for Union Oil, who has been here in court?

A. I don't remember that.

(Testimony of Charles Herbert Caldwell.)

Q. Do you remember where you signed it?

Mr. Nave: If the Court please, I object to that as immaterial.

The Court: Overruled.

Q. (By Mr. Silvers): Do you remember where you signed it, Mr. Caldwell? [414]

A. I believe I was at work on the wharf.

Q. Was that the first time on November 3, 1954, that you made any statement to your company about this fire and explosion?

A. This was a signature of the final draft.

Q. Will you try to answer my question? I will ask it again. Was that the first time you had made any statement to your company concerning this fire and explosion?

A. This is the only statement I made to my company.

Q. You made it for the first time on November 3, or did you make it on a prior date?

A. I am trying to think. This must be the time that I made the statement to the company, November 3rd.

Q. You just said a moment ago this was the final draft. What did you mean by that?

A. Well, my signature was signed on the final draft.

The Court: Did you draw a preliminary draft of this?

The Witness: Yes, sir.

The Court: Did you write that out in your own handwriting, or typewrite it?

(Testimony of Charles Herbert Caldwell.)

The Witness: I made a statement and others wrote down what I had to say. Then I surveyed it and made any corrections I saw fit, so that it was——

The Court: This is your correction of what somebody wrote down purporting to record what you told them? [415]

The Witness: Yes, sir.

Q. (By Mr. Silvers): The words, then, that are used in this statement are not yours, but words that you have approved?

A. I signed the statement as being my own words.

Q. Were they? A. Yes, sir, they are.

Q. You actually wrote or told to someone the words that make up this statement, this typewritten statement, is that your testimony?

A. That's right.

Q. Do you remember to whom the statements were made? A. Mr. Hill.

The Court: Who is Mr. Hill?

Mr. Silvers: Mr. Hill is here.

The Court: No, the witness, ask the witness. Who is Mr. Hill?

The Witness: The safety supervisor for the Union Oil Company.

Q. (By Mr. Silvers): When did you first talk to him about this accident and explosion?

Mr. Nave: Your Honor, I want to object again as being immaterial.

The Court: Overruled. [416]

(Testimony of Charles Herbert Caldwell.)

The Witness: I believe it was on the date I made this statement.

Q. (By Mr. Silvers): Is it your testimony you did not speak to the fire supervisor, Mr. Hill, of Union Oil, until November 3, 1954, concerning this fire and explosion? A. 28, 29, 30.

Q. This is the 3rd of November, Mr. Caldwell, not October. A. Oh, heavens.

Q. This is a month and some three days, a month and a week, approximately, after the explosion.

A. I seem to have made some mistake. Could I correct myself?

The Court: Yes, certainly.

The Witness: This statement I made was made within a week after the explosion and fire happened, and I must have signed it at a later date, then. I mean, it bears the date on the day I signed it.

The Court: Did you sign any other statements?

The Witness: No, sir.

The Court: In connection with this accident at any time for anybody?

The Witness: No, sir, I made one statement to the Coast Guard and one to the Union Oil Company.

The Court: Did you make any written reports to [417] your company, either before or after the signing of this statement?

The Witness: This is the only——

The Court: Concerning this incident?

(Testimony of Charles Herbert Caldwell.)

The Witness: This is the only statement I made to the Union Oil.

Q. (By Mr. Silvers): Just to make sure I have that clear, then, I understand you are saying this is the only statement that you have made to the Union Oil, but you did speak of drafts. Now, do I understand that someone else wrote down what you first said and then you corrected that, is that correct? A. Yes, that's right.

Q. Was the something that was written down by this other person, something written in long-hand or typed?

A. The original was in longhand and it was later typed and then I made corrections on the typewriting.

Q. From that corrected typewritten statement, this one which has been introduced in evidence was produced, is that your recollection?

A. Yes, sir.

Q. The Court has inquired about your knowledge of the capacity of this tank on the Santa Lucia, and if I have understood your testimony, you denied knowing what the capacity of the tank was, is that right? [418]

A. That is correct.

Q. Isn't it a fact, however, Mr. Caldwell, that regardless of whether the tank holds thirty, fifty, seventy-five or a hundred gallons you knew that when someone came and asked for gasoline as took place on this particular day that they were asking

(Testimony of Charles Herbert Caldwell.)

for gasoline enough to fill the capacity of the tank, isn't that correct?

A. No, that's not necessarily so.

Q. This was an auxiliary tank, wasn't it?

A. I don't know that it was.

Q. You knew that the main engines were powered by diesel?

A. You say an auxiliary tank; he said it was an auxiliary engine, not an auxiliary tank.

The Court: Tank of the auxiliary engine.

Q. (By Mr. Silvers): I am sorry. You knew that the tank that was being filled with gasoline was an auxiliary tank, didn't you?

A. That's what the man told me.

The Court: When did he tell you that?

The Witness: When I lowered the gas hose to him.

The Court: What did he say?

The Witness: I asked him if his main power was not diesel and he told me yes, but this was gasoline for his auxiliary tanks, auxiliary engine.

Q. (By Mr. Silvers): [419] Very well. Isn't it true that on September 23, 1955, you were asked this question and gave the following answer:

Mr. Nave: What page?

Mr. Silvers: Page 48, line 23.

"Question: Well, you knew on the basis——"

Mr. Nave: Pardon me, your Honor. That is a question, I believe, that has been asked by other counsel.

(Testimony of Charles Herbert Caldwell.)

The Court: I will permit it to be asked by this counsel.

Mr. Nave: I object to the duplicate cross-examination on the same subjects.

The Court: Your objection is overruled.

Q. (By Mr. Silvers): Didn't I ask you on that day the following question and didn't you give this answer:

"Question: Well, you knew on the basis of your past experience that the custom was to request gasoline for an auxiliary tank enough to fill the tank, isn't that correct?"

"Answer: Well, yes, he would request enough to fill his tank."

Didn't you give that answer to that question?

A. I did, and I also clarified it later.

The Court: How did you clarify it later?

Mr. Nave: I request counsel—— [420]

Mr. Silvers: Just a minute, Mr. Nave, the Court has asked a question.

The Court: How did you clarify it later, if you recall?

The Witness: If a man asked for gasoline enough to fill one tank he probably could have left another tank open. He didn't say to shut it off at thirty gallons, he thought he would take about that much, and if he was filling two tanks it could have gone over.

The Court: You were waiting word from him to shut it off?

(Testimony of Charles Herbert Caldwell.)

The Witness: He would have shut it off and told me he was full.

Q. (By Mr. Silvers): As a matter of fact, if the man had said he wanted 30 gallons, you would have shut it off at 30, wouldn't you?

A. If he said specifically he wanted 30 I would have shut it off.

Q. If he had said I want thirty gallons instead of saying I want about thirty gallons you would have shut it off?

A. If he had said shut me off at thirty I would have shut it off.

Q. Well, if he had simply stated I want thirty gallons of gasoline you would have shut him off, wouldn't you? A. No. [421]

Q. Now, on the very next page of that same deposition weren't you asked this question—counsel, page 49, line 7 reading from the witness' answer to what is recorded as a question, but is not strictly speaking, that the question was recorded that I stated at that time was: "That is right, it varies for one thing according to the capacity of the tank."

And your answer following that statement was as follows, was it not, Mr. Caldwell?

"Whatever lines he may have left open as to filling other tanks if the man said he wanted exactly thirty I would have shut him off at thirty, but where he didn't I went about my business expecting him to shut his own tank off when he was full."

Didn't you give that answer at that time?

(Testimony of Charles Herbert Caldwell.)

A. I believe that is just what I restated.

Q. So because Frank Cardinale said, according to your testimony, that he wanted about thirty instead of saying he wanted thirty, you decided you would not have anything to do with shutting the gasoline off, is that correct?

Mr. Nave: I object to that as being argumentative, your Honor.

Mr. Silvers: Goes to the state of mind, your Honor.

The Court: Overruled. I don't think his state of [422] mind has much to do with this case, but I will permit the question.

Mr. Silvers: Would you read it back——

Q. Do you have the question in mind?

A. I do not.

Mr. Silvers: Would you read it, please?

(Record read by the Reporter.)

A. If he had said shut me off at thirty gallons I would have closed it off, otherwise he has control of his fueling.

Q. At any time, as I have understood you, all that you needed to shut off the flow was to turn a quarter turn of the valves beside the meter, is that right? A. That's right.

Q. And you knew, didn't you, Mr. Caldwell, that it would take between five and ten minutes to provide about thirty gallons to this vessel on September 28, 1954?

A. No, sir, I did not. These were approximates.

Q. Maybe I misunderstand you, but I thought

(Testimony of Charles Herbert Caldwell.)

you said, Mr. Caldwell, a number of times that it would take about—between, rather, five to ten minutes to produce about thirty gallons of gas, the variation in time depending on the level of the gasoline in the storage tank on the dock. Did I misunderstand that testimony?

A. That is an approximation, yes. I said that earlier.

Q. And that was knowledge you had on September 28, 1954, [423] was it not? A. Yes.

Q. Yet this operation, according to your testimony, was permitted to continue from between fifteen to twenty minutes, isn't that right?

The Court: Your question is argumentative. How long did this continue from the time they put the nozzle into the outlet on the deck up to the time you heard him shut the flow off?

The Witness: Your Honor, I don't know. I think it was around fifteen or twenty minutes.

The Court: All right.

Q. (By Mr. Silvers): You heard the engines of the Santa Lucia being cut off before it came—withdraw that.

You knew that the engines of the Santa Lucia were not running or operating at the time it came alongside and tied up, isn't that correct?

Mr. Nave: I object to that, if the Court please. This witness would have no knowledge what went on inside the engine room.

The Court: You may ask him whether or not he noticed whether the engines were running.

(Testimony of Charles Herbert Caldwell.)

Mr. Silvers: He said so to his company on November 3. [424]

The Court: All right, don't argue with counsel, ask him direct.

Did the engines continue to run after she docked, or were the engines turned off?

The Witness: The engines were turned off as she tied up.

Q. (By Mr. Silvers): Now, in addition to not noticing any smells of cooking, you noticed no activity of any kind in the galley, isn't that correct, during this entire loading operation?

A. I don't even know where the galley was.

Q. Did you know on November 3, 1954, when you signed this statement?

A. I did not observe anything on the galley, or any cooking going on.

Q. Did you know where the galley was on November 3, 1954? A. No, sir.

Q. I thought you said these were your words. I am calling your attention, Mr. Caldwell, to this particular sentence in the first paragraph—excuse me, the second paragraph of that statement.

“I observed no activity in the galley and I did not hear the radio running.”

Now, did you or didn't you say that?

A. I did. [425]

Q. Did you tell us you observed Frank Cardinale actually insert the nozzle of the gasoline hose into the fill pipe on the deck of the Santa Lucia?

A. Yes, sir.

(Testimony of Charles Herbert Caldwell.)

Q. Did you observe whether the nozzle or hose of the pipe—withdraw that.

Did you observe whether the nozzle filled the aperture of the fill pipe?

A. No, sir, I did not.

Q. You can't say whether it was loose or tight fitting, is that correct? A. No, sir, I couldn't.

Q. During the fifteen to twenty minutes you estimate this loading operation to have taken place, how much time in minutes, let us say, did you actually have Frank Cardinale under your observation?

A. That is very difficult to answer. I would say it would be a quarter of the time over all that he was tied up to the dock.

Q. Was the gas meter destroyed in the fire and explosion?

A. I don't know; I believe it was.

Q. To your knowledge was the gas hose completely destroyed?

A. I believe there was one picture we have of a piece of the hose hanging onto the dock, but can only identify the [426] coiled wire that was left of it.

Q. At no time during the loading operation did you observe anyone turning on any kind of machinery aboard the Santa Lucia, did you?

A. No, I didn't.

Q. Isn't it correct that part of your duties at the time you were talking about, when someone asks for approximately 30 gallons of gas to inform him

(Testimony of Charles Herbert Caldwell.)

when the approximately 30 gallons of gas had been delivered?

Mr. Nave: Object to that as having been asked and answered repeatedly.

The Court: Yes, objection sustained. You see, you're using a legal term when you use duty. I am to determine what his duties were in the light of the evidence and the facts as I ascertain them.

Mr. Silvers: I will rephrase that, your Honor, if I may.

Q. (By Mr. Silvers): Isn't it correct, Mr. Caldwell, that part of your duties as outlined for you by your employer, the Union Oil Company, at the time we are talking about, when someone asks for approximately 30 gallons of gasoline to inform them when the approximately 30 gallons of gasoline have been delivered? A. No; in that respect, no.

Mr. Silvers: Counsel, page 35, line 7. [427]

Q. (By Mr. Silvers): My question, Mr. Caldwell, I will ask you if I didn't ask at that time in September, the 23rd of 1955, if you did not give the following answer to that question. My question:

"Question: Isn't it correct——"

Mr. Nave: May it please your Honor, I want to make an objection to this specific question at this time; the question and answer have been heretofore asked this witness and it is repetitious.

The Court: Even so, this is cross-examination by another counsel. He has that right. Objection overruled.

Q. (By Mr. Silvers): My question:

(Testimony of Charles Herbert Caldwell.)

“Isn’t it correct that part of your duties at the time we are talking about where someone asked for approximately 30 gallons of gas to inform him when the approximately 30 gallons of gas had been delivered?”

Your answer:

“If he asks for it in that respect, yes, I would. In this case he didn’t.”

Didn’t you give that answer at that time?

A. That statement was made if the man asked to be informed——

Q. Just a minute, Mr. Caldwell, the only question—— [428]

The Court: Were you asked that——

Mr. Silvers: ——the only question is did you give that answer?

The Witness: I did, yes.

Q. (By Mr. Silvers): Did you or didn’t you?

A. I misunderstood it.

Mr. Silvers: I have no further questions, your Honor, at this time.

The Court: Any questions, counsel?

Mr. Vartan: I promise to be short.

The Court: Take as long as you want.

Mr. Vartan: You always say that, your Honor, you are very nice, but I know it is getting late.

Q. (By Mr. Vartan): One question, Mr. Caldwell.

(Testimony of Charles Herbert Caldwell.)

Redirect Examination

By Mr. Vartan:

Q. You only had the man on the vessel, Frank Cardinale, within your view one-fourth of the time, is that true?

A. That is an approximation.

Q. All right. The rest of the time you did not have him in view, right?

A. That's right.

Q. So the rest of the time you don't know whether he was at the nozzle or not, isn't that true?

A. Sir, as far as I know he was at the nozzle all the time.

Q. Now, you say that this was a spring-loaded type nozzle which was used in this case. Now, assuming that it was this type (indicating) the flow starts by pulling your fingers, contracting your hands or fingers the way I have, is that true?

A. That is right.

Q. And when you let go it automatically stops?

A. Yes, sir.

Q. You testified before this was introduced in evidence when I asked some questions that this was the same type of nozzle that was used for the diesel deliveries, is that right?

A. It is similar.

Q. Is this the type of nozzle that a man would hold for the delivery on the boat, for the delivery of 3000 gallons of diesel oil and he would have to hold his hands that way for an hour or so?

(Testimony of Charles Herbert Caldwell.)

A. As I testified before, some of them put something under it to hold it open.

Q. Where did they put something, what do they put?
A. In place of your fingers?

Q. What do they put?

A. Whatever the man chooses, it's his choice.

Q. What have you seen them put? [430]

A. A screwdriver.

Q. When they put the screwdriver under it what happens?
A. It holds the nozzle open.

Q. And they can walk away, then, can't they?

A. They could.

Q. That was the practice that you had observed from previous fueling operations, isn't that right?

A. It isn't a good practice, but I have seen it done.

Q. You have seen it done. Now the screwdriver, I assume, the handle of the screwdriver is stuck right in here, is that right, right at the base of the pin that comes out?

A. No, sir, it is placed between the guard and the trigger.

Q. Show me where it is placed.

A. In this business here.

Q. Where?

A. This position where I have my fingers. (Indicating.)

Q. That is what I meant, right between the guard and the trigger. And when a screwdriver is placed there, or, as a matter of fact, a piece of wood can be placed there, too, couldn't it?

(Testimony of Charles Herbert Caldwell.)

A. Possible.

Q. And when that is done the man can walk away and leave the nozzle, can't he?

A. Yes, he could.

Q. The delivery of diesel, Mr. Caldwell, was that occasionally made to intake pipes which came up on the deck? [431]

A. I don't understand the question.

Q. Well, ordinarily when you delivered, sold diesel fuel to fishing vessels where was the intake pipe for the diesel fuel, same as the gasoline, similar?

A. Some vessels it was.

Q. In other words, it came up to the deck; in other words, the intake pipe came up flush with the deck?

A. Yes, that's correct, that is the standard.

Q. Some of the intake pipes for diesel fuel on some vessels were on the same side of the vessel as the gasoline intake pipe was on the Santa Lucia, isn't that true?

A. That's true.

Q. So you had seen men taking delivery of two to three thousand gallons of diesel fuel lock this nozzle in an open position and leave it there for an hour or so until they got their supply, isn't that true?

A. No, sir.

Q. You had never seen them do it?

A. For an hour, no.

Q. How long does it take, ordinarily, to deliver three thousand gallons of diesel fuel?

A. Excess of an hour.

Q. All right. A moment ago you said you had

(Testimony of Charles Herbert Caldwell.)

seen people put a screwdriver or wood or something else to keep it open and you said you had seen them do that. Now, I am asking you [432] had you seen them do that when they had the nozzle stuck into an intake on the deck of the vessel, fishing vessel?

A. Why, yes.

Q. You had seen them do that in the past before the day of this accident, isn't that right?

A. That's what I said.

Mr. Vartan: No further questions.

Mr. Nave: I have two questions, your Honor.

Recross-Examination

By Mr. Nave:

Q. Mr. Caldwell, were you at any time aboard the fishing boat Santa Lucia? A. No, sir.

Q. Did you ever make an inspection of the fishing boat Santa Lucia?

A. I have never been on the Santa Lucia.

Q. Did you observe or see Mr. Cardinale or anyone else aboard the fishing boat Santa Lucia insert any screwdriver, piece of wood or a wedge into the lever on the gasoline hose?

A. No, sir, I did not.

Mr. Nave: All right. That is all I have.

(Testimony of Charles Herbert Caldwell.)

Redirect Examination

By Mr. Vartan: [433]

Q. You don't want to leave the impression of your own knowledge you don't know that that was done after a minute and a half elapsed when you walked away when you weren't looking at this man, you don't know whether he did that or not, do you, of your own knowledge?

Mr. Nave: Object to that as being argumentative.

The Court: No, overruled. Did you see him do that? Let's put it——

The Witness: No, sir.

The Court: ——in a more direct way.

The Witness: No, sir, I did not.

The Court: Did you see this nozzle at any time jammed open in that fashion that you have described?

The Witness: No, sir.

The Court: At any time during this delivery of gasoline to the Santa Lucia?

The Witness: No, sir, I did not, and it was in my view any time I looked at the vessel.

Q. (By Mr. Vartan): It was in your view 25 per cent of the time, isn't that true, that is what you said? A. Yes, sir.

Q. And the other 75 per cent of the time it was not within your view; isn't that true?

A. That's an approximation. [434]

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: Very well. That is all.

The Court: All right, sir.

Mr. Silvers: If I may be permitted, your Honor, one question I forgot to ask concerning one of the photographs I introduced in evidence.

Recross-Examination

By Mr. Silvers:

Q. Mr. Caldwell, I am going to call your attention to two photographs, Respondent's Exhibits C and D in Evidence. The section of photograph C that I am referring to, that I am now pointing out to you, these pilings in this row, they represent the pilings alongside of which the Santa Lucia tied up, isn't that correct? A. That's true.

Q. This is the side of the oil dock, the gas sales dock that faced the Santa Lucia? A. Yes.

Q. This is the site where you were standing when you saw Frank Cardinale at the time, you have already indicated, right? A. Correct.

Q. Now, there is no fire damage on any of the pilings on the Santa Lucia side of the pilings, is there?

Mr. Nave: Your Honor, I object to that, asking this witness something that calls for a conclusion and requires [435] an interpretation of photographs.

The Court: He is asking him from his observation a physical condition which are patently before him. Objection overruled.

(Testimony of Charles Herbert Caldwell.)

The Witness: As you observed I agree that the fire damage is least next to the boat, but I am willing to offer an explanation of why——

The Court: No, we don't want an explanation.

Q. (By Mr. Silvers): I don't want it, I would like it as you saw——

The Court: Counsel, I can observe this photograph myself.

Mr. Silvers: All right.

The Court: What you may interrogate the witness on is concerning his personal observations of this dock after the fire.

Q. (By Mr. Silvers): At any time after the fire, Mr. Caldwell, did you see any fire damage on the face of the pilings that faced toward the Santa Lucia? A. Why, yes, I did.

Q. On what portion of the pilings?

A. On both the inside and the outside in some locations.

Q. I am not talking about the inside of the pilings, I am talking about the outside, the outside face of the pilings that [436] was nearest to the Santa Lucia. Do you understand my reference, first of all?

A. As to what part of the dock are you talking about?

Q. I am talking about the part of the dock alongside which the Santa Lucia tied up. Do you have that in mind?

A. That's a very general question.

(Testimony of Charles Herbert Caldwell.)

Q. Well, isn't it the part that is shown on these photographs, Mr. Caldwell?

A. Well, on your photographs that is what it appears.

Q. I didn't take these.

The Court: That would be the east side of this dock?

The Witness: Yes, sir. The bow of the Santa Lucia was most heavily damaged and that's where most of the damage was, and this is a different part of the dock.

The Court: Any other questions?

Mr. Silvers: No, your Honor.

The Court: Thank you very much.

Mr. Nave: Your Honor, please, I have one question on this photograph mentioned here.

Recross-Examination

By Mr. Nave:

Q. Mr. Caldwell, I call your attention to Respondent's Exhibit B, a photograph, and you mentioned in your testimony [437] in response to, I believe, a question of Mr. Silvers, that part of the wire or bonding wire of the gasoline hose was in the picture. I will ask you to examine this photograph and tell me if you can see in that photograph the bonding wire or part of the hose that you have mentioned?

I call your attention to an X that had been marked on this Exhibit previously and ask you if that is what you are talking about?

(Testimony of Charles Herbert Caldwell.)

A. Yes, sir, that is it.

Q. That is the piece of the bonding wire out of the hose that was used in the filling operation?

A. Yes, sir, this is the same wire.

Mr. Nave: For the record that is an X that appears on the photograph to the right of the second piling from the right. Thank you, I have no further questions.

Redirect Examination

By Mr. Vartan:

Q. Did you have a grounding cable present on that gas dock? A. Is that a question?

Q. Yes.

A. The grounding cable was the wire with the hose.

Q. I asked you whether you had a grounding cable?

The Court: Separate from the hose?

Mr. Vartan: Separate from the hose? [438]

A. No.

Q. (By Mr. Vartan): Did you use a grounding cable on the Lompoc that day?

A. Yes, sir.

Q. Was the hose on the Lompoc different from the hose here?

A. It is all of a similar nature.

Q. It also has the wire, doesn't it?

A. Yes, sir.

Q. The Lompoc has hose just like the hose that was used to fill the Santa Lucia. In other words, it

(Testimony of Charles Herbert Caldwell.)

has the wire entwined that counsel just pointed out in the picture, but on the Lompoc—you helped work the Lompoc that day, didn't you?

Mr. Nave: If the Court please, I object to the interrogation concerning the Lompoc, not being immaterial here.

The Court: Objection overruled.

Q. (By Mr. Vartan): You worked on the loading or filling of the Lompoc, didn't you?

A. Some.

Q. You know that a grounding cable was used in that case, don't you? A. Yes, sir.

Q. And none was used for the Santa Lucia, was there? A. No, sir.

The Court: What type of hull is the [439] Lompoc?

The Witness: That is a steel hull.

The Court: Any further questions, counsel?

Mr. Vartan: No, your Honor.

Mr. Nave: Your Honor, may I ask——

The Court: Now, gentlemen, if there is going to be much more here with this witness we better have the witness come back tomorrow. We can stay here as long as you want, but I would like to know. Should I direct this witness to come back tomorrow morning or do you want to complete the examination today?

Go ahead, ask your question.

(Testimony of Charles Herbert Caldwell.)

Recross-Examination

By Mr. Nave:

Q. Mr. Caldwell, in the filling of this type of gasoline on a wooden hull is it necessary and customary to use grounding cable? A. No, it isn't.

Q. Did you have any instructions to use a grounding cable when you're filling a wood hull fishing boat of this type?

A. The only thing to bond to would be the fill opening of the gas tank and that is bonded through the hose.

Mr. Nave: Thank you.

Q. (By Mr. Vartan): Is that bonded through the hose when the nozzle is [440] taken away from the hole and laid on the open deck?

A. No, sir, it isn't.

Q. So when the nozzle is raised from the fill pipe there is no bonding cable in effect, isn't that right?

A. The bond would be disconnected.

Mr. Vartan: Yes. That is all.

The Court: Thank you, gentlemen. Come in for a few minutes and I will be glad to see you in chambers.

(Whereupon the Court adjourned until 10:00 o'clock a.m. of Friday, September 6, 1957.) [441]

September 6, 1957—10:00 A.M.

The Clerk: Cardinale and others versus Union Oil Company and others, further trial.

Mr. Vartan: Ready, your Honor.

Mr. Nave: Ready.

Mr. Silvers: Ready.

Mr. Vartan: Call Doctor Mason to the stand.

DAVID M. MASON

a witness called by the Libelants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: David M. Mason.

Direct Examination

By Mr. Vartan:

Q. What is your business or occupation, please?

A. I am a professor of chemical engineering at Stanford University.

Q. I didn't get that, please.

A. Professor of chemical engineering at Stanford University.

Q. What is your position in the chemical engineering [442] department at Stanford?

A. I am the head of the division of chemical engineering.

Q. You are the head of it? A. Yes.

Q. Where did you receive your college training?

A. I received my Bachelor's, Master's and Doc-

(Testimony of David M. Mason.)

tor's degree at the California Institute of Technology.

Q. Were those degrees in the field of chemical engineering?

A. They were in the field of chemical engineering, yes.

Q. Doctor, are you a member of any chemical societies, please?

A. I am a member of the American Institute of Chemical Engineers.

Q. Does the subject of the formation and combustion of gasoline vapors fall within the fields of your study?

A. Yes, they do, both my research studies and also my teaching.

Q. That also includes the character, natures and propensity of gasoline vapors?

A. That is correct.

Q. Have you engaged in any research in the field of the gasoline or similar vapors?

A. Yes, I worked for the jet propulsion laboratories for six years at which time I worked with hydrocarbon combustion.

Q. Where was that, please? [443]

A. This is located at Pasadena; it's a part of the California Institute of Technology.

Q. In that research did you personally conduct experiments in that field? A. Yes, I did.

Q. Besides being the head of the chemical engineering department at Stanford do you actively engage in teaching? A. I do, yes.

(Testimony of David M. Mason.)

Q. Will you tell his Honor what subjects you teach?

A. Well, over the past few years I have taught a course in industrial chemistry, a course in chemical engineering kinetics, a course in combustion, and a course known as unit operation, and chemical engineering.

Q. Now, Doctor, these questions are probably very elemental and his Honor probably has judicial notice of many of them, but preliminarily gasoline is——

Before I ask you that, when we use the term “gasoline” in these questions, throughout the questions, we mean 7600 Union Oil commercial gasoline. Now, are you familiar with that? A. Yes.

Mr. Nave: It is 76.

The Court: I think the witness said 7600. It is regular gasoline, regular gasoline as distinguished from the [444] so-called special Ethyl.

Mr. Vartan: Yes.

Q. (By Mr. Vartan): Now, gasoline normally is in liquid form, is that right?

A. That is correct, yes.

Q. And gasoline in liquid form is combustible?

A. In a liquid form it is not combustible, no. Gasoline itself is just a fuel, and until mixed with some oxidizer, such as air, which requires vaporization, it is not combustible.

Q. Is gasoline volatile by nature?

A. Quite volatile, yes. This is one of the characteristics of gasoline as a fuel. It is quite volatile.

(Testimony of David M. Mason.)

Q. Will you tell us the process of the volatility of gasoline, what happens when it goes through the process of volatility?

A. Well, the process of evaporation is what occurs and liquid gasoline, having a very high vapor pressure, has a tendency to form a large amount of vapor in a short period of time.

Just as a point of reference, gasoline is roughly about fifteen times as volatile as water, and I think this volatility is very well demonstrated when one sees spillage of gasoline on paving, it immediately tends to disappear or vaporize.

Q. Now, when gasoline vapors are formed as a result of [445] the process you just described will you tell us what their relative weight is to air?

A. Gasoline vapors are quite heavy relative to air. They have a density of about three to four times that of air. Accordingly, they tend to stay at a low level and they don't have a great tendency to rise.

Q. If gasoline vapors are formed, putting it in layman's language, am I correct in saying they are four times as heavy as air?

A. That is correct, yes.

Q. Also in layman's language am I correct in saying, Doctor, that when gasoline vapors are formed they tend to seek lower levels?

A. That is correct.

The Court: In a normal atmosphere?

The Witness: In air, yes, that is correct.

(Testimony of David M. Mason.)

Q. (By Mr. Vartan): Now, gasoline vapors, it goes without saying, are combustible?

A. That is definitely, yes.

Q. And is there a range of—I don't know if I am putting this right—is there a mixture or a range of mixtures of combustion?

A. Well, in order for gasoline vapor to propagate, or the combustion process, there must be a certain amount of air [446] present, and it turns out with this particular system gasoline takes from about 1.3 to about 6 volume per cent of the gasoline vapor admixed with air to form a combustible mixture.

Putting it a little differently, it takes, oh, about 98.7 to 94. per cent of air admixed with the gasoline vapors to form a combustible mixture.

In other words, for gasoline vapor to burn there must be a great excess of air present, and this, of course, makes gasoline vapors quite useful as fuel. Secondarily, it makes it quite explosive.

The Court: Can you have combustion without oxygen?

The Witness: Truly speaking, you can, yes.

The Court: Practically speaking, gasoline vapors?

The Witness: No, gasoline vapors you cannot.

The Court: Go ahead.

Q. (By Mr. Vartan): Can gasoline vapors, within the combustion ranges or range that you just mentioned be formed in the open?

A. Yes, they certainly can.

(Testimony of David M. Mason.)

Q. Are gasoline vapors more readily formed in the open than they are in a confined space?

A. Yes, they are.

The Court: Are they more quickly dissipated in the open?

The Witness: Yes, that would follow. In [447] other words, the fact that you have an open container allows the gasoline liquid to vaporize more rapidly, it doesn't build up a barrier as it does in a closed container. There is a continuous process of vaporization in an open container, while naturally in a closed vessel the vapor will build up and then stop.

Q. (By Mr. Vartan): Yes. Now, to illustrate only the actual process of the formation of gasoline vapors, will you take this hypothetical situation, and it's rather crude, but I just want to illustrate the process.

Assume that you have a can of gasoline, say six feet in diameter, a round can and you have a quarter of an inch or $3/16$ ths of an inch or a $1/16$ th of an inch of gasoline in that can and it is out in the open. Now, from that point will you tell the court what takes place as the vapors are formed?

A. Of course, you have this process that I mentioned earlier, the vaporization occurring, and, depending on the thickness, say a $1/16$ th inch thickness of liquid might completely disappear in a matter of three to five minutes.

The Court: Wouldn't the rate of disappearance

(Testimony of David M. Mason.)

depend on large measure upon the heat to which it was subjected?

The Witness: Yes, this would be at normal atmospheric conditions.

The Court: What do you mean by a normal atmospheric [448] condition, what would you take to be a normal atmospheric condition?

The Witness: I would say——

The Court: With reference to temperature.

The Witness: I would say 70 to 100 degrees fahrenheit. At 100 degrees fahrenheit the process would be much more rapid. At a normal temperature of 70 I would say about 3 to 5 minutes might be expected.

Q. (By Mr. Vartan): Having in mind what has been described as a balmy day in San Luis Obispo——

The Court: I don't know that any such standard can apply. But it seems to me this testimony, while I have great respect for this witness' training and education and ability and competency, it seems to me that as a matter of common sense there are so many variants present that I don't see how the professor's testimony is going to be of very great help to me.

Mr. Vartan: Yes, your Honor, as I have prefaced the question——

The Court: If he had been there at the time of the explosion I might take his expert opinion as to what caused the accident.

(Testimony of David M. Mason.)

Mr. Vartan: No, I am not assuming the burden, your Honor, on behalf of these seamen——

The Court: All right, go ahead, but I simply want [449] to indicate to you my thought.

Mr. Vartan: I know, but I merely state my position for the record, we have certain testimony——

The Court: You go right ahead, counsel, don't make any apologies.

Mr. Vartan: All right.

Q. (By Mr. Vartan): Now, having in mind the hypothetical situation, you stated that there would be a process of formation of gas vapors. Now, to what height, having in mind the absence of air or breeze or wind, to what height would those gas vapors rise above that can of gasoline?

A. Well, of course there is this general inclination of gas vapors being heavier than air to cling to the ground. Once again, the actual climatic conditions would have to be known here, but I would say just in general there would be a tendency for the vapors not to rise to too great a height.

Q. All right. And then after formation and rising to, you said, to not too great a height, what would the direction of the vapors be?

A. There is a tendency for them to diffuse laterally, that is, to creep along the surface and continual eddying and mixing of the gas laterally as well as mixing in a vertical direction.

Q. Now, will you explain the time element in-

(Testimony of David M. Mason.)

involved in the [450] formation of gas vapors in the hypothetical situation?

A. Well, as I said, once again I think it would be a rough approximation to say that in about a 16th inch thick layer of liquid gasoline would take in the order of three to five minutes to vaporize at, say, about 70 degrees fahrenheit, in the absence of any strong gust of wind, just a normal free evaporation.

The Court: Under ideal laboratory conditions.

The Witness: Yes, correct, without any—this would be increased, the time would be lessened if one had some forced conditions, breezes, blowing.

Q. (By Mr. Vartan): Now, assume you placed the same can of gasoline in the engine room of a vessel which, I think, has been estimated to have a 120 square feet of free space, would the time element of the evaporation of that gasoline be the same or any different?

A. May I ask, you are mentioning the free space, what is that figure?

Q. 1200 square feet.

A. 1200 cubic feet?

Q. I mean cubic feet.

A. Actually, to get an idea of how much explosive vapor can be formed from gasoline the rule of thumb is that each gallon of gasoline can form, when admixed with the appropriate mixture of air, can form ten thousand gallons of combustible mixture. So that in this particular space you are mentioning, [451] 1200 cubic feet, about a half a gallon

(Testimony of David M. Mason.)

of gasoline mixed with the appropriate amount of air could fill the space with combustible mixture.

Q. And with the same time elements involved in the confined area that I mentioned?

A. Now, are we assuming again we have a free evaporation from the liquid?

Q. Yes.

A. Yes. This would be, perhaps——

The Court: I am going to give very, very little weight to this testimony. The professor never saw the ship, he doesn't know the conditions that are there. It is common sense and common knowledge that gasoline vaporizes, and it is common knowledge, and I will take judicial notice of it, if not, I will take it from the professor's testimony, that gasoline vapors are combustible and that if confined in an area and if ignited it will give out an explosion similar to what you have in an automobile engine.

Mr. Vartan: Yes.

The Court: That's common knowledge.

Mr. Vartan: Yes.

The Court: I think we can almost——

Mr. Vartan: I think I mentioned that.

The Court: I think we almost can take judicial notice of those facts of everyday life. [452]

Mr. Vartan: All right. I was apologetic——

The Court: Don't be apologetic.

Mr. Vartan: I know this is elementary, but we didn't know whether we should bring it in for the record.

(Testimony of David M. Mason.)

The Court: You go ahead and you try your case the way you see it.

Mr. Vartan: This is a circumstantial case, you see.

Q. (By Mr. Vartan): Now, Doctor, can you please state the characteristics of a combustion of gas vapors in the open, what takes place?

A. Of course, to initiate the combustion process there has to be a source of ignition, and in a gasoline-air mixture normally any ignition source which attains a value of 500 degrees fahrenheit or higher will cause combustion to ensue.

Now, this source could be in the form of a spark, hot body of any type, just as long as the local temperature is raised to the 500 degree fahrenheit level.

Q. What takes place when the ignition of these gas vapors takes place, what occurs?

A. Propagating from the source of ignition then we have a flash fire, in common parlance, but it is actually a combustion process which, in the gas phase, travels at a very high rate of speed, roughly about twenty feet per second in the normal air-gasoline mixture, and this spreads throughout the whole combustible gas-air mixture. [453]

Q. In other words, we are talking about the combustion of gas vapors in the open?

A. Correct.

Q. By the way, is there a color to a flash fire of combustible gas vapors out in the open, is there a color that can be seen?

A. Yes. We might go back a bit and point out

(Testimony of David M. Mason.)

that combustion truly is the rapid chemical oxidation accompanied by a large quantity of thermal energy or heat, and also accompanied by light due to the thermal energy.

Now, one would see in a gasoline-air combustion process a colored flame, and, depending on the temperature, the flame could be either real white, which would represent a high temperature, or a dull red which would represent a lower temperature. Specifically, the high temperature of about 1800 degrees centigrade would cause a white flash or a flame. A temperature of a lower order of around a thousand degrees centigrade would cause a red flame. And you would have something in between this spectrum, depending on the temperature.

Q. Now, the flash that takes place is the actual rapid burning of the gas vapors, is that right?

A. That is correct.

Q. And the flash that takes place takes place right at the point where the oxidation or burning, rapid burning of the vapors take place, isn't that true? [454]

A. Yes. In other words, the light that one sees from a flame is the end result of the combustion process, the evolution of heat.

Q. Now, what are the characteristics of a combustion of gas vapors, Doctor, which takes place in a confined area? We can just as well assume an engine room of a vessel of 1200 cubic feet.

A. Well, when this particular combustion process is confined the energy developed, which re-

(Testimony of David M. Mason.)

sults in raising the temperature you just mentioned, also, if confined, will result in a rising of the pressure, and if completely confined and the vessel is not strong enough to withhold it, the pressure developed will cause destruction of some type.

Actually, to give a figure in a laboratory test with gasoline-air in an appropriate combustible mixture range, one develops anywhere from fifty to one hundred pounds pressure per square inch in the vessel.

Q. Now, going back to the combustion of gasoline vapors in the open you mentioned that there would be a resultant flash or light. Is there also a sound which results from such a combustion in the open?

A. Well, in a combustion process in the open very often it will be accompanied by a rushing sound, such as a sudden gust of wind. If confined, one is likely, due to the pressure that builds up, there is suddenly a release of this pressure [455] and one develops what is known as a shock wave and we get a concussion or report and it sounds like an explosion.

Q. The flash resulting from a combustion of gas vapors in the open, is there also a disturbance of atmospheric pressure where an object can be knocked down or turned around?

A. Oh, yes, certainly there is a pressure wave form as energy and if it strikes an object a force is imposed on the object.

(Testimony of David M. Mason.)

Mr. Vartan: Now, I am almost afraid to ask this, some of these questions, they are so elementary, your Honor, but——

The Court: Don't hesitate at all to ask any question you think you should now.

Mr. Vartan: All right.

The Court: Don't give any apologies, you have a duty to perform.

Q. (By Mr. Vartan): Doctor, it's true, is it not, that when a combustion of gasoline vapors takes place in the open you said there is a flash. Now, it's true that there is heat generated?

A. Yes.

Q. Is that a very sudden generation of heat?

A. Yes, I think as I mentioned a minute ago the combustion process itself will spread through a gas at quite a high velocity, and it is fair to say combustion is this maximum [456] pressure I mentioned a moment ago of about 50 to 100 pounds per square inch and is developed in the order of two one hundredths of a second in a laboratory test.

Q. Now, in that two hundredths of a second of high heat can a flash burn to the hands of a person within the flash area result?

A. Oh, yes, the fact that one has temperature as high as 1800 degrees centigrade could certainly result in burning of any type of tissue.

Q. Doctor, will you please assume that during the fueling of a vessel with gasoline and after ten to twenty minutes of fueling process there are two

(Testimony of David M. Mason.)

noises or booms heard and a flash takes place out in the open followed by an explosion from the bowels of the vessel, now, first what significance does the flash preceding the explosion in the bowels of a vessel have to you?

Mr. Nave: Pardon me. I object to that as assuming a hypothetical state of facts.

The Court: Well, we will take the answer, but I again state I am not going to pay a bit of attention to it. I will allow the answer on the record. I don't give it any weight at all. The doctor may testify as to chemical properties of gasoline and he may testify as to the action of the gasoline under different circumstances and I will be a most interested hearer. However, he never saw this ship; you have no evidence [457] of the atmospheric conditions, you have no evidence of the temperature, you have no evidence as to a number of variables which would alter the weight to be given to his testimony.

Mr. Vartan: Well your Honor, if I may be heard——

The Court: If there was a breeze blowing on this dock, Professor, I guess you could not get any vapors to collect on it, could you?

The Witness: Yes, right locally near the vessel it turns out that——

The Court: I say on the dock.

The Witness: Yes. Just a moment, please. The vapors cling over the deck, they will be at rest, the

(Testimony of David M. Mason.)

gas will be at rest right next to the body, so you could have local——

The Court: It would depend on the direction from which the wind was blowing, wouldn't it, Doctor?

The Witness: Yes, certainly would. But I say right close to the deck you still have a portion of the gasoline, but eventually——

Mr. Vartan: I wish your Honor would listen——

The Court: I am going to listen to him as I am required to do in fairness, but the weight to be given an expert's testimony rests entirely with the trier of the fact, and I simply indicate to you my evaluation of this testimony with respect to this particular case.

You go ahead, though, you make your [458] record counsel. Somebody else might give greater weight than I.

Mr. Vartan: Well, the position placed——

The Court: The position is you make your record, counsel. You ask your questions, you protect your clients' interest.

Mr. Vartan: Well, it takes the wind out of my sales when your Honor says it is useless.

The Court: I simply tell you that as a trier of the facts. Of course, it might be proper if I sat here like a bump on a log and kept my mouth shut.

Mr. Vartan: No, no, your Honor.

The Court: I am not built that way and I don't believe that's part of a judicial process.

Mr. Vartan: If I may be heard very shortly.

(Testimony of David M. Mason.)

The Court: You go ahead now, and make no apologies, again I tell you, make no apologies for propounding any question you feel is a proper question and is necessary for the protection of your clients' interest.

Mr. Vartan: You see, we have certain evidence given by the witnesses, for example, of the flash and explosion and this man, being an expert, we want him to explain the phenomena, the scientific explanation.

The Court: Go right ahead.

I don't think the Professor answered the last question. [459]

Mr. Vartan: I forgot what it was.

The Court: If it was a good question you would remember it.

Mr. Vartan: Not after this discussion, your Honor.

The Court: Do you remember the question that was asked?

The Witness: The question was in regard to the possibility out in the open with a breeze, the combustion process occurring.

Q. (By Mr. Vartan): Yes, let's go into that. What effect does a wind described from as practically no wind up to 3 to 5 miles an hour over the open area of the dock have upon the formation of gas vapors; first, as to the formation?

Mr. Nave: I object to that, if the Court please——

The Court: Overruled.

(Testimony of David M. Mason.)

Mr. Nave: For the record I want to make an objection; assuming something not in evidence.

The Court: That's right, I understand. We have no evidence as to the wind force here at any time.

Mr. Vartan: Yes, your Honor, one of the witnesses, Mr. Garrett Ray, testified it was a balmy day, there was a very small amount of wind, and one of the other witnesses testified something about three to five miles an hour wind upon cross-examination by Mr. Nave. [460]

The Court: All right.

The Witness: I would say—incidentally, this would be a relatively low wind velocity and it would definitely be feasible to have gasoline vapors accumulate in an area with this type of wind. Naturally, some of the vapors will be swept away; at the same time the sweeping action hastens the volatilization, so it is fair to say particularly right close to some solid body that the velocity would approach zero. This is a known fact, and therefore vapors would be in quite a high level of concentration at this point.

Q. (By Mr. Vartan): All right. Now, what significance would the two noises having been heard at the time of the flash followed by the explosion, what significance would that have?

A. Well, I think it would be fair to say if one saw a flash and could localize it this would indicate to him, perhaps, the source of the ignition mixture. If this were followed by an explosion it would indicate that the propagation, which I mentioned was

(Testimony of David M. Mason.)

at a fairly high rate, went from the source of ignition to some other location where perhaps the combustible mixture was confined leading to what we know as destructive combustion or explosion.

Q. And that would result in two noises?

A. Yes.

Mr. Vartan: You may cross-examine. [461]

The Court: Mr. Whelan, did you prepare the decrees on the other five cases?

Mr. Whelan: We will have them by Monday; I have had no time.

The Court: All right.

Mr. Nave: We have no questions.

The Court: Do you have any questions, counsel?

Mr. Silvers: Yes, sir.

The Court: All right.

Mr. Silvers: I would like to offer in evidence, your Honor, another photograph of the Santa Lucia, may it please the Court.

The Clerk: Respondent's Exhibit L introduced and filed into evidence—Cardinale's Exhibit.

(Whereupon, the foregoing photograph was introduced and marked as Respondent's Exhibit L (Cardinale) in Evidence.)

(Testimony of David M. Mason.)

Cross-Examination

By Mr. Silvers:

Q. Doctor Mason, I am going to refer to a certain boat called the Santa Lucia, which was blown up, the case we are involved with, by a Union Oil gas dock. The picture of the Santa Lucia that I am showing you now, that I am going to show you now, and the picture of the oil dock as shown in Respondent's [462] Exhibit I, I am also showing you. The dimensions of the boat were about 72 or three feet long with a beam of about 21 feet, and the character of its superstructure, the openings, portholes and so on, I think, is revealed by the photograph you have looked at.

Will you keep those points in mind, please, when I direct your attention to the boat in the area of the dock.

Mr. Silvers: Your Honor, I would like to offer in evidence at this time a sketch drawn by the marine surveyor, Captain Hansen, which all parties have seen, showing diagrammatically the location of the engine in the engine room, the exhaust leading from the engine to the outer air and the vent in the forward part of the ship.

The Court: Any objection to that?

Mr. Vartan: No, your Honor.

Mr. Nave: I have no objection if it is for the limited purpose only of showing the space inside the hull of the ship.

The Court: All I want to know is there an ob-

(Testimony of David M. Mason.)

jection to receiving this in evidence as being an accurate picturization or a diagram of the portion of the ship it purports to portray?

Mr. Nave: I object to it, your Honor.

The Court: Objection sustained.

Mr. Silvers: I am not offering it for the purpose of—— [463]

The Court: I am not going to take these Exhibits with a lot of limitations on them. Either you consent to that and admit it or you don't.

Mr. Silvers: I would like to offer it for illustrative purposes only.

The Court: Illustrative of what? He says it is not illustrative of the engine room. If he concedes that it is I will take it in evidence.

Mr. Silvers: Well, I hadn't quite finished. Illustrative of the site of the main engine of the forward vent leading——

The Court: I will not take it in evidence unless consent is given that it may be received for that purpose.

Mr. Nave: I object to its introduction: Captain Hansen will have to identify it and testify as to how he arrived at the computations.

Mr. Vartan: Let the record show that Captain Hansen——

The Court: The record will show nothing, there is nothing before me now.

Mr. Vartan: All right.

The Court: Won't have the record show something until you bring in a witness. Go ahead. [464]

(Testimony of David M. Mason.)

Q. (By Mr. Silvers): Doctor, from your knowledge of the characteristics of gas vapor is it probable that gas vapors formed on the dock that I have shown you a picture of, assuming the vessel I have shown you a picture of was tied up alongside that dock, would find their way in seeking lower levels into the portholes and other open spaces of the vessel as you see it in the photograph?

Mr. Nave: If the Court please, I object to that as calling for a conclusion, not based on facts in this case. Furthermore, it would not be proper cross-examination of this man who was introduced as an expert by the Libelants.

The Court: If the professor can answer this question he is more than a professor, he is a magician. However, the objection is overruled. Let him answer it.

The Witness: I think one has to set some conditions on the picture. This wind velocity again enters the scene. May I also ask on the dock are there——

The Court: You may not ask—on that question can you give him an opinion on that question?

The Witness: Not without hypothesizing.

The Court: All right.

Q. (By Mr. Silvers): Well, assume further that the wind conditions, having been described by an eye witness as being from zero to 3 to 5 miles an hour, assumes a warm, balmy day so that someone fishing [465] in a skivvy shirt 50 feet way, assume that the dock you are looking at is approximately 15

(Testimony of David M. Mason.)

to 20 feet above the water level and the main deck of the vessel you see there is approximately 12 feet below the level of the dock; assume an installation on the dock that includes in part a gas tank with ordinary commercial automobile gasoline on it, and then I would like to ask you whether vapors, gasoline vapors formed from liquid gasoline of that type would, because of their physical characteristics, tend to seek lower levels below the level of the dock, and assuming the boat in the position I have described, leave and enter, rather, enter the boat through openings, such as portholes, doorways and ventilators as shown on the photograph.

Mr. Nave: I object to that, if the Court please, assuming a state of facts, not in evidence.

The Court: Objection overruled. We will let the witness answer, if he can.

The Witness: There is this natural inclination for gasoline vapors to seek their own level, four times as heavy as air, so they naturally tend to go downward. Now if there were, let's say, cracks of some type in a dock area then the tendency would be even enhanced for them to spill underneath the pier itself. As I said earlier there definitely would be a zero velocity of wind vapor right at the surface of the dock itself irrespective of the wind velocity up further, so there [466] would be a tendency for these vapors to seek a lower level. Some of them would spill over the edge of the pier and if there were cracks in the pier there would be a tendency for them to spill through that.

(Testimony of David M. Mason.)

Q. (By Mr. Silvers): And would a flash described by an eyewitness as an orange-white flash approximately fifteen feet in height rising about ten feet above the level of the dock that you have before you and extending out from the dock in the direction of the boat tied alongside some five feet and extending below the level of the dock approximately five feet, would such a white flash first indicate an ignition of gasoline vapor in the area where it is seen? A. It would, yes.

Mr. Nave: Pardon me. I object to that, if the Court please, again assuming something not in evidence, calls for a conclusion of this witness.

Mr. Silvers: Well, this has been testified to by the witness Garrett Ray.

Mr. Nave: Furthermore, not proper cross-examination. This man is now being used as a witness by Mr. Silvers as a professional expert and it isn't cross-examination. I want that objection on the record.

The Court: The objections are duly noted upon the record, but it is my ruling the objection is overruled. [467]

Q. (By Mr. Silvers): If you have the question in mind, Doctor, would you answer it? Or would you like to have it repeated?

A. I think you better repeat it.

The Reporter: There was an answer: "It would, yes."

Mr. Silvers: I am sorry.

(Testimony of David M. Mason.)

Q. (By Mr. Silvers): And would that flash, which I think you told us is actually a very fast fire, is that correct? A. Yes, correct.

Q. Communicate over a gas-air vapor trail to the ship, assuming that there was a gas-vapor trail leading from the dock to the ship alongside as I have previously described?

Mr. Nave: May I make the same objection and on the same grounds as previously phrased?

The Court: Objection overruled.

The Witness: Wherever there is a combustible mixture of gasoline and air and in a continuous path, all it takes is a source of ignition in one location to cause this explosion to travel throughout the whole body of the combustible mixture.

Q. (By Mr. Silvers): And during the time that the explosion is not confined, during the time it is moving, in my example, from the dock to the vessel, it is observed as a flash, is that right?

A. Yes. [468]

Q. When that fire or explosion enters a confined area, such as the engine room of a vessel we are referring to, what we commonly talk of as an explosion then takes place because of the confinement, is that correct?

Mr. Nave: May I note an objection on the same grounds?

The Court: I really don't know what his question means. If he does, he may answer, and your objection is overruled.

The Witness: Once again, if one assumes there is a combustible mixture in this confined space you

(Testimony of David M. Mason.)

are mentioning and there was this ignition source starting the combustion trail up on some other area, then it's true this will go into the confined space, combustion will ensue there and result in a high pressure and resulting in damage.

Q. (By Mr. Silvers): Doctor, in the after portion of the deckhouse (on the photograph I have shown you) is located what witnesses have described as the galley of this boat—I am pointing to the general area—there is a stove in that galley. I will ask you to assume that, and I will ask you further to assume that there is a small pilot light in the stove; I will ask you to assume that—withdraw that last phrase. Could that pilot light in the stove in the area that I have described for you ignite a combustible vapor-air mixture in the galley and [469] in the immediate stove area causing an explosion without destroying or severely injuring the stove?

Mr. Nave: I object to that question, if the Court pleases. There is no foundation laid for a question of that type in this case.

Mr. Silvers: Your Honor, here is a man who is an expert on gas.

The Court: We will let him ask it. Overruled.

The Witness: I think what is fair to say again if there is a combustible mixture of air and gasoline in the galley there is an avenue of—there is an ignition source, which I have pointed out, and if there is a flame which would have come oh, five hundred degrees fahrenheit temperature, there would be an ignition source and combustion is very likely to

(Testimony of David M. Mason.)

occur if these combustible mixtures come to the ignition source.

Now, the extent of damage, of course, is going to depend on the quantity of these gaseous materials in the galley, and one could go between two extremes. One could either get a small, maybe a small wisp of gas, there would be just a flash, in which case one would not see damage. On the other hand, if the whole galley was filled with a combustible mixture then one could get serious damage in the galley.

But the answer to the possible combustion, if these gases do, in the proper mixture, get near the flame, they are [470] going to ignite. The extent of damage depends on the amount of vapors present.

Q. (By Mr. Silvers): Well, if there were explosions within the space of that time, a second or two, sufficient to break apart a ship, the one you are looking at, so that the midship section is completely broken or broken to the extent it immediately sinks, if an ignition source sufficient to produce that kind of result were in the galley stove or immediately around it, would the galley stove immediately after that kind of explosion be intact?

A. In my opinion the galley would not be intact, no.

Q. Including the stove?

The Court: You see, counsel, the professor will tell you he has never seen the stove, he knows nothing about the specifications of the stove, and if he were to tell you that the stove would or would not

(Testimony of David M. Mason.)

be intact he has a wonderful imagination and he is not basing it upon scientific knowledge.

Don't you agree with that, Professor?

The Witness: That is true, yes.

The Court: You know so little about these conditions, that really all you can tell us about are the general properties of gasoline under certain conditions; isn't that a fact?

The Witness: Yes, and hypothesizing certain situations with the same gasoline vapor and air mixtures. [471]

Q. (By Mr. Silvers): Doctor, in all your training and experience you have become familiar with the explosive characteristics of gasoline, haven't you? A. Correct.

Q. And you have observed on many occasions the resulting explosive characteristics of gasoline on material objects, have you not? A. Yes.

Q. Then you can tell us, can't you, on the basis of your training and experience what is going to happen to a galley stove that would fit within the confines of the galley that is in the photograph I have shown you, which has been described by a witness as being perhaps five or six feet in length and maybe a couple of feet wide on the top surface. You can do that, can't you?

A. I think of two possibilities. I would say a cast iron, old type of stove, might withstand this combustion process and not show material damage. A light sheet steel type of stove might be caved in.

(Testimony of David M. Mason.)

There would be a range of damage unless one would see the stove.

Q. Is it your expert opinion that an explosion serious enough to break apart this vessel that you are looking at would not damage a cast iron stove if the ignition took place at the stove? [472]

A. Possibly, yes.

Q. But it's not very probable, is it, sir? Isn't it more probable the stove would be completely destroyed?

Mr. Nave: I am going to object, if the Court please——

The Court: Counsel, we know nothing about the strength of the vessel, this man never saw it, we don't know whether the wood was good or rotten, we don't know whether the boat was held together with straps, you don't know what the condition of the ship was. If he can tell you, he is a wonder. If he did I would lose a lot of respect for the professor's ability.

Q. (By Mr. Silvers): Assume the height of the engine room in the vessel that you're looking at now, sir, to be approximately eight feet, about thirty feet long and about fifteen feet wide; assume the galley to be located on the main deck above that in the after portion of the vessel, as I have pointed out to you; how long would it take in time for any gasoline vapors formed in the engine room from approximately twenty to thirty gallons of liquid gasoline to make their way up a hatchway leading

(Testimony of David M. Mason.)

from the engine room to the galley as located in the photograph I have shown to you?

A. What type of distance are we talking about here in feet from the engine room up to the galley and what height?

Q. The engine room is eight feet, the galley is on the [473] main deck immediately above the engine room, the distance from the galley to the engine room itself is approximately twenty or twenty-five feet. Assuming that, how long would it take for gas vapors formed by a spill or leakage of liquid gasoline in the engine room to reach the area of the galley?

Mr. Nave: Same objection, if the Court please. Improper examination of this witness.

The Court: Overruled.

The Witness: All I could say in general is there would be a tendency, because of the high density of gasoline vapor, there would be a tendency for it to stay and cling to the lowest area in the ship and, therefore, barring any kind of circulation of the vapors the tendency for the process of going upward would be quite slow, and depending on the distance, the further away the longer the time.

Q. (By Mr. Silvers): Well, I have given you certain specific distances.

The Court: The professor hasn't finished. Go ahead.

The Witness (Continuing): I would say it would definitely depend on the distance-time, barring any, let us say, barring any kind of circula-

(Testimony of David M. Mason.)

tion at all. I can give a figure with respect to diffusion rates and you would find gasoline vapor under these circumstances traveling probably about a foot in the order of—traveling about a foot [474] per minute in this particular case.

Q. (By Mr. Silvers): I am asking you to assume certain figures and quantities and distances that I have already mentioned.

A. As I say, if there is a twenty foot distance this would take twenty minutes for the diffusion process to occur, assuming there aren't any barriers, just a straight laboratory experiment where you're following the rate of gasoline through air in a still system.

Q. The natural characteristic of gasoline vapors, however, would be to remain at the lower level rather than to ascend, isn't that correct?

A. Yes, but there is this diffusion process, this is another process I am talking about, where in spite of the density of the gasoline, it would have a tendency to move through the gas even against this gravitational field, and this occurs at the rate of roughly one foot per minute.

Q. But you said that is based on laboratory conditions?

A. That is correct.

Mr. Silvers: I have no further questions.

(Testimony of David M. Mason.)

Cross-Examination

By Mr. Nave:

Q. Doctor Mason, assuming that this photograph that was handed you, this fishing boat, that there is in this engine [475] room that has been described to you in those approximate dimensions——

A. Yes.

Q. ——that some sixty gallons of gasoline went into that engine room down into the bilge area.

A. Yes.

Q. Now, if you testified somewhere between approximately one per cent and seven per cent you have a flammable vapor? A. That is correct.

Q. That's correct? A. Right.

Q. And if you had 30 gallons, 40 gallons, 50 gallons, 60 gallons, or even a less amount, that went into the bilge in that engine room you would, in the process of a very few minutes, have a flammable range of vapors, wouldn't you?

A. That is correct.

Q. And you have stated to his Honor these vapors, due to their volatility, would rise and that if they came into contact with any source of ignition that would produce the degree of heat that you have stated, you would have an explosion, wouldn't you?

A. That is correct.

Q. If you had a flammable mixture of three to four per cent you would have a violent explosion, wouldn't you, normally? [476]

A. Depending upon the—for the explosion to

(Testimony of David M. Mason.)

propagate this mixture would have to be from one point five to six volume per cent. Wherever this mixture exists the source of the ignition will cause the spread of the explosion through this mixture, right.

Q. What I am getting at is the difference between—say you had one or one and a half per cent flammable vapors you would normally have a less violent explosion than if you had a three to a five per cent mixture? A. Yes.

Q. Isn't that true?

A. The maximum energy occurs at what we call the stoichiometric point which means, actually, the true point of balance between the exact amount of oxygen and the exact amount of fuel to burn the mixture completely. That would be the maximum. I think in this case it is around four per cent, it's right in the middle of this combustibility range.

Q. Now, assuming, Doctor, some thirty to sixty gallons of gasoline went down into the hold of this engine room of this ship. A. Yes.

Q. And assuming that there was a sudden flash in the area of the ship and a violent explosion that knocked its masts off and blew its superstructure off, it is an inescapable conclusion, is it not, that the gasoline that was in the engine room [477] exploded; isn't that true?

A. It is assuming there was some there?

Q. Assuming there was a concentration of gas.

A. And there was an ignition source, yes.

Q. It would show, you would assume then there

(Testimony of David M. Mason.)

had been a violent explosion within the inside of the fish boat? A. Yes, correct.

Q. Now, this wind that Mr. Silvers was asking you about, assuming that you had a wind of three to five miles per hour that was blowing from this direction towards over the fishing boat and towards the dock——

Mr. Vartan: Mr. Nave, will you make an arrow when you say “this direction,” so we will know the direction?

Mr. Nave: Yes, the wind was blowing in this direction, south, southeast.

Q. (By Mr. Nave): Assume the wind was 3 to 5 miles an hour blowing in that direction. If you had any concentration of gasoline vapors spilled on the dock that wind would tend to blow those vapors away from the fishing boat, wouldn't it?

A. As I said earlier, there would be a tendency for the upper portion of the vapors to be blown away. However, there are always, as long as liquid gasoline, assuming there was liquid gasoline——

The Court: When the upper portion was blown away [478] wouldn't that be a tendency then for the lower portion to rise?

The Witness: Yes, it would rise, but as long as the liquid was there there would be in this area——

The Court: Wouldn't that also lessen the density of these vapors, make them less volatile?

The Witness: No, as a matter of fact, the more air you have, as I mentioned earlier, the more combustible this mixture is. You need 94 to 97.3 air

(Testimony of David M. Mason.)

in order to even have combustion, so that, true enough, this breeze coming over the desk top here, if this were covered by liquid gasoline, would hasten the vaporization process and would have a tendency to blow some of the vapor in the upper portion of the table away. However, right close to the table the velocity of the gas would go to zero.

So these vapors could still cling as long as there is any source of liquid gasoline present.

Q. (By Mr. Nave): By the same token, Doctor, assuming there is some 30 to 60 gallons of gasoline that had formed this flammable range inside the fishing boat and the fishing boat exploded——

A. Yes.

Q. ——in the manner I have told you, with the superstructure blown off and the mast down and this 3 to 5 mile an hour wind I have told you about, would that not tend to blow the inflammable vapors in the direction to which the wind was [479] blowing after which followed the violent explosion?

Mr. Silvers: Just a minute. I am not sure I understand the question, your Honor. I will object on the ground counsel has placed the inflammable vapors in his question inside the boat and he is now asking the witness whether the 3 to 5 mile an hour wind would blow the inflammable vapors away.

Mr. Nave: No.

The Court: Objection overruled.

The Witness: The question, as I understand it, that you asked was first you see the explosion and

(Testimony of David M. Mason.)

then you have the wind blowing the vapors after the explosion occurred. I am a little confused.

Q. (By Mr. Nave): I will reframe it this way, Doctor. Let's assume this fishing boat blew up.

A. Yes.

Q. And I told you there was some 60 gallons of gasoline down in the hold, or some large quantity, and the fishing boat blows up, there is a flash and a violent explosion.

A. Yes.

Q. Then you have a 3 to 5 miles an hour wind blowing in a southerly direction indicated here, would that not tend to blow the vapors that have been released by the explosion in the manner I have mentioned in the direction of the wind? [480]

Mr. Silvers: Just a minute, Doctor. Your Honor, I am going to object to the question in its present form on the ground that it is a misstatement of the evidence which is already in the case and assumes facts that are contrary to the evidence which is already in the case.

The Court: Overruled. It is cross-examination.

The Witness: Yes. Shall I wait until counsel is through?

The Court: Go ahead.

The Witness: In answer to your question I think what you have to hypothesize is that after this explosion occurred, that after this explosion occurred, there was still some unburned gasoline vapor. In other words, vapor that was in the wrong combustibility range would be ignited, which was

(Testimony of David M. Mason.)

present, which would then blow over. I think that is what you would have to assume.

Q. (By Mr. Nave): Now, if there was a white flash, a brilliant white flash right over the area where this fishing boat exploded—

Mr. Vartan: Just a minute, your Honor, that certainly assumes something not in evidence.

The Court: In the first place he hasn't finished his question. In the second place, this is cross-examination, so we will let him ask him anyway. Now, finish your question first. [481]

Q. (By Mr. Nave): Assuming what I assumed before, that there is some gasoline in the hold of this ship. A. Yes.

Q. That there is a violent explosion with a huge flash over the top of the ship, the masts fall down and the superstructure is blown off. A. Yes.

Q. That flash is fire, isn't it?

A. That is correct, it represents the high temperature combustion.

Q. That is the end result of the explosion?

A. Correct.

Q. Now then, again assuming a 3 to 5 mile an hour wind that I have mentioned, would that not blow the vapors that are burning in the direction of the wind?

A. Well, as I say, I want to make clear that—in other words, this white flash you see represents complete combustion of those particular gases. In other words, they are no longer capable of supporting combustion. As a matter of fact, in the ultimate

(Testimony of David M. Mason.)

you get carbon dioxide, water, which isn't combustible. So you must, in addition, say that somehow or other some of the gasoline which did not burn, in other words, it wasn't consumed in this white flash, is still left behind and is vaporizing, and I would say, in my opinion, the only possibility [482] of this occurring was some liquid remained behind that hadn't formed vapor of combustible limits that caused the first flash and this liquid could then be vaporized.

Q. Doctor, assuming a concentration of gasoline of some 60 gallons of gasoline, for example, and you have a flash, you don't mean to say that the entire body of gasoline is consumed in that flash, do you?

A. Yes, all that gasoline within the combustible limits is consumed and, as a matter of fact, due to the pressure wave created, even those gases present that are not in the combustibility range are usually stirred up so that the vapor would go on and burn subsequently. If there is liquid remaining behind—you see, the liquid, as I said earlier, itself cannot support combustion, no oxygen in the liquid gasoline, it has to go through a vaporization stage first before combustion can ensue. Presumably the liquid remaining behind could, in sequence, then be evaporated by this process you are mentioning.

Q. All right. Now, assuming further in the hold or in the engine room of this fishing boat that we are discussing there are Diesel tanks containing

(Testimony of David M. Mason.)

Diesel fuel. Assume there was a flash and explosion, isn't it true that the fumes and the Diesel fuel itself would be dispersed by the explosion?

A. Yes, the energy released from the explosion would tend to vaporize any liquid and hasten the vaporization process. [483]

Q. And those vapors released and the fuel released by the explosion would be combustible, wouldn't it?

A. It certainly would.

Q. And if they came in contact with fire they would ignite and burn, would they not?

A. They would.

Mr. Nave: I believe that is all. Thank you, Doctor.

The Court: Any further questions? I want to thank you very much.

Mr. Vartan: May we have our recess now?

The Court: Yes. How long do you want, gentlemen?

Mr. Vartan: Ten minutes, your Honor.

(Short recess.)

Mr. Vartan: Call Doctor Cox, please.

WILBUR J. COX

called as a witness on behalf of the Libelants, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court?

The Witness: Wilbur J. Cox. [484]

Direct Examination

By Mr. Vartan:

Q. Doctor, you are a physician and surgeon?

A. I am.

Q. How long have you practiced your profession, please?

A. I was first licensed in California in 1926.

Q. What has been your medical training, please?

A. Graduated from the University of Indiana. I was in New York three years, trained at the Kings County Hospital, moved to Los Angeles and took a few years of orthopedic training there and then moved to San Francisco in 1932, took some orthopedic training at the University of California.

Q. Are you on the staff of any hospital?

A. Yes, part time teaching staff, University of California and various——

Q. In what field?

A. Orthopedics.

Q. Orthopedics. Has that been your specialty for several years? A. Yes, sir.

The Court: Are you a diplomate, Doctor?

(Testimony of Wilbur J. Cox.)

The Witness: Yes, sir.

Q. (By Mr. Vartan): Doctor, did you examine Joseph Salmeri on April 5, 1957? [485]

A. I did.

Q. Prior to your examination did you take the customary history? A. Yes, sir.

Q. Will you please state what history you obtained?

The Court: Doctor, you didn't treat this man, did you?

The Witness: No, sir.

The Court: As a patient? You examined him simply that you might give an evaluation of his condition?

The Witness: Yes, sir.

Mr. Vartan: All right, your Honor.

The Court: Let him tell us what he found, what his opinion is.

Mr. Vartan: Yes, your Honor.

The Court: The prognosis.

Mr. Nave: May I have the date?

Mr. Vartan: April 5, 1957.

Q. (By Mr. Vartan): Doctor, what did your examination of this man show?

A. I would like, if you don't mind, to enumerate his complaints to me. Presently pain in the right shoulder, continues exercise of the right shoulder, also feels a clicking in the shoulder, a tired sensation in the forearm, steady pain in the forearm and elbow to wrist, occasionally has sharp pains [486] extending into the little finger, as well as the ring.

(Testimony of Wilbur J. Cox.)

He develops an ache in the arm with activity, soreness in the elbow joint.

I found that he had an old fracture of both bones of the forearm. The fracture of the radius is about four to six inches below the elbow joint. The fracture of the ulna bone was about at the same level. It was ununited. An operation had been performed on both forearm fractures. The fracture of the radius had united, but in my opinion the fragments were in position so that one fragment was rotated on the other.

In other words, there was a complete 180 degree twist of the radius of one fragment on the other.

There was also a complete severance of the extensor tendons of his thumb so that the patient was unable to move his thumb into a position of extension.

There was also a complete severance of the sensory branch of the radial nerve producing an anesthesia involving the dorsal radial surface of his hand extending out to the index finger and the thumb.

United fracture of the shoulder joint—not of the shoulder joint, but the collar bone. He had a satisfactory range of motion in the shoulder joint.

The gripping power on the left side, or his involved side, is markedly decreased—on the right side, I beg [487] your pardon, being 70, and on the left side, which was uninvolved, 155 plus.

As a result of my examination I felt that this patient was totally disabled from any type of labori-

(Testimony of Wilbur J. Cox.)

ous occupation and the disability was permanent and total unless some type of reconstructive surgery is performed. Reconstructive surgery would consist of a bone grafting operation of the ulna and an osteotomy of the radius and to derotate the united fragments of the radius in an attempt to restore rotation in the forearm.

He also needs either a tendon graft to repair the function of his extensor tendon, the tendon grafts to be taken from the flexor surface of his forearm and transplanted and the anatomical snuff box restored to contour. At the same time there would have to be a suture of the sensory branch of the radial nerve, either that, if you can't approximate it, he would have to have a nerve graft.

Q. Now, the bone graft that you mentioned was made necessary because of the fracture which you found was not united? A. Ununited, yes, sir.

Q. Is there in his arm at the present time any artificial support or rod?

A. At the present time the rod has been completely removed, and if you wish me to, I can display this X-ray of the forearm. [488]

Q. Very well.

The Court: I have seen it. If you want to display it for yourself, you may do so.

Mr. Vartan: All right, fine.

Q. (By Mr. Vartan): Now, Doctor, what is the time element that would involve a bone graft to attempt to cure this fracture condition that has not

(Testimony of Wilbur J. Cox.)

united, how long would it take in hospitalization and recovery?

A. I would say this one of the real major difficult mechanical operations in orthopedic surgery because it entails repairing a bad job, and, of course, there is a certain amount of speculation connected with it and one cannot always guarantee any kind of a result, but I would say this, that barring complications, one could be reasonably sure that you could obtain bony union in the ununited ulna, but I am not at all sure how much rotation can be restored to his forearm by derotating his fragments because of the fixed position of the two joints which come into play in permitting rotation of the [489] forearm.

That is the joint in the elbow and the joint at the wrist, they work in unison, you might say, and one bone rolls over the other one, a joint up here and a joint up here (indicating).

Of course, if one fragment is rolled on the other one and united, it means that you cannot restore the rotation of the forearm, so this joint might be ankylosed and this might be disturbed to the extent that I can't say how much rotation could be restored.

Q. Now, the loss of the extensions of the thumb, loss of the use, you mentioned the extensors going to the thumb were severed? A. Yes, sir.

Q. What is involved in the possible repair of that situation?

A. Probably have to have a tendon graft or

(Testimony of Wilbur J. Cox.)

tendon grafts. Usually the long extensor tendon, which I am demonstrating here, is more or less like a bowstring, and passes to the ulnar side of the forearm, and when it is severed, one end retracts in the forearm like a bowstring. And in order to restore the power of that, one has to bridge the gap by a tendon graft by taking an accessory tendon from the flexor surface of the wrist or one from the foot or from the leg and the short abductor tendon would probably also have to have a tendon graft. And I think because the tendons are severed on the extensor surface of the wrist, there is reasonable assurance that one can [490] restore extension of the thumb.

Now, the radial nerve which passes the sensory branch, which supplies the dorsal radial surface of the hand and the index finger and thumb, possibly could be resutured without nerve graft, but sometimes if the gap can't be bridged, you have to take an accessory sensory nerve and bridge the gap.

Q. Doctor, did you examine his shoulder for any abnormality in the alignment of any bones of the shoulder where the fracture was?

A. Yes; the fracture of the collar bone has united, it is overlapped and shortened a little bit, but it has not really disturbed the mechanism of the shoulder joints too much.

Q. You say he complained of clicking. Did you examine him for that?

A. Yes; I felt clicking about his shoulder joint and I could not determine the nature of the clicking.

(Testimony of Wilbur J. Cox.)

Q. I see. Doctor, you examined on the same day a Frank Pedrasaz? Did you also examine Frank Pedrasaz on this same day, I believe?

A. Yes, sir.

Q. And what were his complaints to you, Doctor?

A. He informed me he sustained an injury to his right wrist and right ankle.

Q. Did he have any complaints in the area of the wrist [491] to you?

A. Yes, sir. He stated that he sustained a fracture, fracture of the right wrist, which required two different manipulations and reduction was unsatisfactory. So the third time an operation was performed and a graft was removed from his right iliac crest and transferred to the fracture site to serve as a bridge or trellis to support the other bony structures.

Also, the result of this fracture, he complained of numbness of the thumb, index and middle fingers, and periodic swelling of his hand, pain of the dorsal surface of his arm and forearm, especially with gripping, and loss of power in his hand.

He also had an injury to his ankle, right ankle, in which he stated that there was periodic soreness.

I found that he had a slight limitation of wrist joint motion, I would say between five and ten per cent.

On the flexor surface of the wrist there is a two and a half inch curved operative scar, slight tenderness when pressure was applied.

(Testimony of Wilbur J. Cox.)

The Court: What did you say that five per cent disability was, Doctor, that you rated?

The Witness: I beg your pardon?

The Court: The wrist, you say, was five per cent——

The Witness: Between five and ten per cent limitation [492] of motion.

On the extensor surface of the wrist, there is a healed oblique two-inch operative scar that was slightly tender to pressure. He flinched on the forearm when I percussed in that area.

The grip in his right hand measured, after three trials: Right 70; left 115; right 70; left 130; right 70, and left 130, being the normal, so figuring that the major right hand should have a greater grip than the left and the relationship being five-fourths, it indicates that he has about over 60 per cent loss of gripping power in that hand.

Q. (By Mr. Vartan): In your opinion——

Mr. Nave: What was that percentage?

The Court: You mean of the gripping power?

The Witness: Yes, sir.

Mr. Nave: What was the figure?

The Court: He says he has a loss of about 60 per cent gripping power of his right arm.

Q. (By Mr. Vartan): In your opinion, Doctor, is that condition permanent?

A. I think it is reasonable to assume that it is permanent, due to the fact that this operation was performed, well, let's see, I examined him in 1957,

(Testimony of Wilbur J. Cox.)

it had been probably about two and a half years since the operation. [493]

Q. Did he make any complaints with reference to the hip bone where the bone was removed?

A. Yes; he complained of tenderness over the operative scar, and one could feel a definite cupping of the iliac crest where the bone graft was removed.

Q. Now, did you find from your examination anything that you attributed to the complaint of numbness of thumb and index and middle fingers?

A. I thought that possibly there might be one of the minor branches of the sensory division of the radial nerve caught up in the operative scar. The operative scar is located right near the nerve. That could easily account for the numbness, and there is a local area of tenderness when that area was gently percussed with the tip of the finger.

Mr. Vartan: You may cross-examine.

Cross-Examination

By Mr. Nave:

Q. Doctor Cox, in the case of your examination of Mr. Salmeri, first, please, you were talking about a decrease in the right-hand gripping power. You said that was 70 per cent, am I correct in understanding that?

A. I believe that I stated that on Mr. Pedrasaz, the last one——

Q. No; I am speaking now of Mr. Salmeri, the gentleman you examined first. [494]

(Testimony of Wilbur J. Cox.)

A. Yes, sir.

Q. Did I understand you to say there had been a decrease in gripping power in his hand, his right hand, of 70 per cent?

A. I think you misunderstood.

Q. I probably did, the reason I am asking you. I am trying to clarify it.

The Court: He said Pedrasaz, the man who had the broken wrist.

The Witness: Yes. On Salmeri I quoted his gripping as 155 plus.

The Court: Broken radius and ulna.

The Witness: That was 155 left and 70 in the right.

Q. (By Mr. Nave): 155 plus in the right hand?

A. No; in the left.

Q. Left. All right. And what—

A. And 70 in the right.

Q. Now, when you say 70, what do you mean by 70?

A. Pounds pressure per square inch when you grip.

Q. What would be normal?

A. Well, the normal, I would have to figure that from the normal, because if he is able to grip 155 plus in the left hand, you would take one-fifth of 155, which would be about 37, and add it onto it, so it would make the normal grip in his right hand about 190, so he has got about 65 to 70 per cent loss of [495] grip in the right hand.

Q. Now, that loss of grip, 65 per cent loss of

(Testimony of Wilbur J. Cox.)

grip in his right hand, is attributable to what, what is the malfunction there, or the disturbance that causes that loss of grip?

A. Well, number one, loss of function of the forearm bones, that is, the lack of stability and the lack of position of the arm when attempting to grip. It takes, for instance, if he is in this position (indicating), he cannot grip fixed in this position. He can't grip as well as if he can turn his hand over and grip in this position. You see?

Q. It comes from inability to rotate?

A. That's part of it only, that is part of it only.

And then the third thing is the soft tissue injury to the muscles of the forearm, especially the ones on the flexor surface which arrive and come down here and attached to all the tendons. And I would say that in practically every case of a fracture of the forearm in an adult, there is a minimum loss of ten to twenty per cent loss of grip, even though the bones are imperfect apposition, which represents a soft tissue injury.

Q. You stated, I believe, sir, that some type of corrective operative procedure would be indicated that would give some relief to this loss of grip in the right hand?

A. No; I beg your pardon; it might help the grip to some extent, but the main reason was to give him stability on the [496] side where there wasn't union in the ulna and on the opposite side to de-rotate the fragments so that there would be some semblance of rotation in his forearm.

(Testimony of Wilbur J. Cox.)

In other words, the fragments are united, this fragment is united with the palm down, you see, and the upper fragment is turned up the other way; it would mean that he couldn't roll his arm, see?

Q. I understand. If an operation were performed, what effect would that probably have on the percentage of grip restoration of some of the percentage of normal grip?

A. I can't say. It possibly might increase it a little bit, maybe five to ten per cent, but I can't say. That would be speculation.

Q. I understand. The left hand, you say, was 155?

A. Yes, sir.

Q. You consider that normal?

A. Yes; I would call that normal.

Q. You mentioned the fact that the rod in the arm had been removed at the time of your examination?

A. Yes, sir.

Q. And that in connection with that arm there was a lack of bony union, there is a fragment on a fragment, if I understood you correctly?

A. Yes; there is a distinct space where there is a lack of apposition of the fragments. You can see right through it. [497]

Q. Yes.

A. Here, this shows it if you wish to see it.

Q. Yes; I would like to see this.

A. This is the bone which is involved. See, you can see right through it. See, it should be one solid affair, like this, but here in this fracture you can see right through it.

(Testimony of Wilbur J. Cox.)

Q. Now, this bone that shows in the X-ray, the X-ray that shows the fracture in that position is called what bone? A. That is the ulna.

Q. You stated that in that case surgery or an operation is indicated. What would that entail? Is that a question of resetting, is it breaking and resetting, or how is that operation performed?

A. It is a question of making an incision exposing the fracture site on this side, on the ulna side of the forearm, exposing the fracture site by subperiostum section, curette it, expose the broken ends, and drill the ends to bring in new blood supply, and then one has a choice of a grafting material, you can remove it from the shin or from the iliac crest, some doctors have a bone bank to transplant the bone, but I find that a graft from the same subject is better, and you apply that as a plate across the fracture site and fix it in position with four stainless steel screws, two placed above and below the fracture site and opposite the graft, some men chose to apply a stainless steel plate or vitallium [498] plate for stability, for additional stability, and this will serve to hold the fragments and stabilize them while bony union takes place.

The Court: And then you say your prayers?

The Witness: We say our prayers and pray we don't get an infection.

The Court: It is a kind of a dangerous operation. It's major surgery?

The Witness: I would say it is one of the great technical procedures in orthopedic surgery.

(Testimony of Wilbur J. Cox.)

Q. (By Mr. Nave): Now, Doctor, the next thing you mentioned, if I understood you correctly, was you stated, I believe, according to my notes, that there was a need for a tendon graft to restore the use of the thumb, is that what you said?

A. Yes, sir. He has what is known as a thumb drop. In other words, the thumb drops into the palm of his hand.

Q. Yes. Because of that, what happened there that causes that?

A. Years past they used to call this anatomical snuffbox and they used to put snuff in there and sniff it, and the long tendon of the thumb extends, the distal end of the distal phalanx, the short extensor, extends this portion of the thumb, so with both of them severed, you developed what you call a thumb drop. In other words, they can't pull their thumb out of [499] their palm. In order to restore this function, one has to bridge or return this extensor power, connect it up with the muscle which controls this tendon, and due to the fact that it is a strain, the possibilities are that the muscle has shortened to the extent that you would not be able to approximate it proximately without undue tensions, so it would mean that he would have to have a tendon graft, that would be number one, or the transplantation of an accessory tendon into this tendon in order to restore the power, and an additional graft in this area or a tendon transplant to restore function in the other one.

Q. Then I believe the final thing you mentioned

(Testimony of Wilbur J. Cox.)

was in connection with the fractured collar bone. I believe you stated it had united?

A. Yes; it had.

Q. And you found nothing there that required any restoration?

A. Except a bulge, which is not an uncommon finding as a result of a collar bone fracture. He did have some clicking in his shoulder, but I found normal range of voluntary motion, so I don't think one has to worry too much about that.

Q. Well, to put it another way, Doctor, you found nothing in the collar bone situation that would be called disabling?

A. No; I wouldn't think so.

Q. Now, in your examination of Mr. Pedrasaz, you were [500] speaking of a five to ten per cent limitation in the wrist?

A. Yes, sir.

Q. Limitation of motion. That was in the right wrist, is that right, sir?

A. Yes, sir.

Q. And the grip in the right hand was what?

A. 115-70; 130-70; 130-70.

Q. 70; that is pounds, you mean?

A. Pounds pressure per square inch.

Q. As compared to what figure is normal?

A. 130.

Q. Compared to 130. 70 over 130 of normal, is that right; 70 over 130 of normal, is that right?

A. No, no, no. 130 is his normal grip.

Q. That's pounds?

A. Pounds pressure per square inch.

Q. That's right.

(Testimony of Wilbur J. Cox.)

Mr. Vartan: That is the left hand.

The Witness: That is his left hand.

Q. (By Mr. Nave): That's the left hand, all right.

A. Now, gripping power, assuming that he did not have an injury, would be one-fifth greater in the right hand.

The Court: Assuming he was right handed.

The Witness: Yes, sir; assuming he was right handed [501] be one-fifth greater. So his grip should be around 155 in the right hand. So if 155 is his normal, and his present grip is 70, that gives him over a 50 per cent loss of grip; I would say 60 per cent.

Q. All right. Now, the grip in the right hand you determined to be 115, is that right, now?

A. No, no; that isn't right.

Q. Grip in the left hand is 115, am I correct now? A. Grip in the left hand——

The Court: 130.

The Witness: 130.

Q. (By Mr. Nave): 130. And you say that 130 isn't normal, it should be 155?

The Court: The right hand. The right hand has greater power than the left hand. For gripping purposes, assuming that the man is right handed, because I guess, Doctor, from constant use and exercise, it is better developed.

The Witness: That is right.

Q. (By Mr. Nave): Is there any operational procedure that is suggested in reference to this grip-

(Testimony of Wilbur J. Cox.)

ping loss, gripping power? A. No, sir.

Q. And the operation you mentioned, that you felt was indicated, was in reference to a complaint of numbness in his [502] thumb and fingers?

A. Yes, sir.

Q. Did you state, sir, that you felt that an operation was indicated to relieve that?

A. One could explore the sensory branch of the nerve to see whether it is partially severed or whether there is a stitch or scar in the way. Inject it in a salt solution to see if it has been severed.

The Court: It would be best to leave it alone, wouldn't it? It would be best to leave that thumb alone?

The Witness: Well, it depends on how much it disturbs him. I wouldn't want to guarantee such a thing. I don't guarantee anything in operative work, but I think you have to depend on the patient.

Q. (By Mr. Nave): Assuming that the patient was getting along all right, was able to be steadily employed, you wouldn't normally advocate such an operation, would you?

A. No; I wouldn't advocate such an operation, but if he would come to me and said, "This numbness is really disturbing me, it is annoying me, and I would like to have you—I am willing to take a chance to try and restore that," I would say that would be an indication.

Mr. Nave: Thank you, Doctor.

Mr. Silvers: No questions. [503]

Mr. Vartan: No questions.

The Court: All right. Thank you, Doctor. I was very much impressed with your testimony.

The Witness: Thank you.

(Witness excused.)

The Court: I think the Doctor's appraisal was extremely fair.

Mr. Vartan: Your Honor, one of the respondents is the Estate of Frank Cardinale, Mr. Silvers' client, and I have asked him to stipulate that under our California Probates Procedure that we have filed the claim and notice of action and all the matters have been duly taken care of, so that we don't have any technical claim as to the maintenance of the action.

Mr. Silvers: That is agreeable.

Mr. Vartan: Very well.

On the question—these things are sort of up in the air, your Honor—we have checked, and I told Mr. Nave it was 348 or say 350 Francs per dollar at the time mentioned in the deposition of Mr. Jacques Cardinale's widow, and we would like a stipulation as to that so we don't have to bring in anyone.

Mr. Nave: I don't know, counsel, and, your Honor, it is probably correct, but I would like to check to satisfy myself. I am sure the information you have is correct, but I [504] want to check it.

The Court: In one of the interrogatories propounded to her, she received about 200,000 Francs in 1954, but that before her husband left, he left her other funds.

Mr. Vartan: We have a hospital bill from the

Monterey Hospital on Joe Salmeri coming and which we will introduce later.

Now, do I understand your Honor will recess, you said something about this afternoon.

The Court: I want to do whatever you gentlemen want. You have been very accommodating, but the case has to be completed next week, you know.

Mr. Vartan: Yes.

The Court: If you want to recess now until Monday morning, and it is agreeable to everybody so that you can go over and examine the questions of law which I have pointed out to you are presented here, I am willing to do that. We have a very substantial question of law here. There doesn't seem to be too much liability of the Union Oil Company, or the basis of liability, which is asserted here by the libelants. There is practically no factual issue, no substantial factual issue as to the conversation which took place between Cardinale and Caldwell aboard the ship at the time the ship pulled up.

The question of law raised is whether or not, as I [505] see it, in the exercise of reasonable care and prudence, Cardinale had a right to expect, or those aboard the ship, not Cardinale, because he was bound to exercise a certain degree of care himself, whether those who were strangers to the transaction that were aboard the ship, had the right to expect the one who was dispensing gasoline from the dock under those circumstances would keep a watch of the gauge and keep a watch of the outpouring or delivery of the quantity of gasoline and whether or not, if he didn't keep such a watch and an explosion

occurred as a result of leakage aboard the vessel, or from any other cause, whether or not that would be sufficient under which to find negligence on his part.

I can't find any case in point. If you gentlemen want to research that problem, I will be glad to have you do it and hear you next week on it.

Mr. Vartan: I was wondering if we could see your Honor in chambers on another question of witnesses.

The Court: We will go into chambers and we will adjourn until 10:00 o'clock Monday morning.

Now, gentlemen, we are going to be through with this case next week.

Mr. Silvers: Before we adjourn, may I ask your Honor this:

The Court: Yes.

Mr. Silvers: Are there more witnesses to be produced [506] by the libelants?

Mr. Vartan: That is what I want to take up with you gentlemen in chambers.

The Court: All right.

(Whereupon, this matter was adjourned until Monday, September 9, 1957, at the hour of 10:00 o'clock a.m.) [507]

September 9, 1957—10:00 A.M.

The Clerk: Salmeri, et al., vs. Cardinale, et al., and consolidated cases, for further trial.

Mr. Vartan: If your Honor please, we have the two statements from the Monterey Hospital.

The Court: That is Salmeri?

Mr. Vartan: Yes, your Honor. Let the record show that I have shown counsel two bills, one showing the balance due—well, the bills speak for themselves. They total \$360.

The Court: Have you the hospital records from the Monterey Hospital?

Mr. Vartan: No, your Honor.

The Court: Any objection to the receipt of these bills in evidence?

Mr. Nave: No, your Honor.

The Court: Is it conceded these bills are reasonable in amount and were proper charges for the care and treatment of this libellant?

Mr. Silvers: Yes, your Honor.

Mr. Nave: Yes.

(Bills admitted above admitted into evidence as Libellants' Exhibit 12.)

The Court: Do I correctly read these bills [508] as totaling the \$254.83 plus \$105.67? Is that correct?

Mr. Vartan: That is what I understand, your Honor.

The Court: \$360.50, then, as I total the total charges of the Monterey Hospital, is that correct?

Mr. Vartan: Yes, your Honor.

The Court: And you have no hospital records for that period of treatment?

Mr. Vartan: No, your Honor. We asked for them. We are going to telephone, but I think the history was shown.

The Court: All right.

Mr. Vartan: With that, your Honor, the libel-

ants, Salmeri, Pedrasaz, Belleci, and Belleci as administrator of the estate of the widow and children, rest their cases.

The Court: All right. Now, how do you want to proceed? Who wants to proceed first, which one of the respondents?

Mr. Nave: I will, I think, your Honor.

The Court: All right.

Mr. Nave: Mr. Del Rio.

RUDY DEL RIO

called as a witness on behalf of the respondents, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court, sir?

A. Rudy Del Rio. [509]

Direct Examination

By Mr. Nave:

Q. Your name is Rudy Del Rio?

A. That is right.

Q. How old are you, Mr. Del Rio? A. 31.

Q. And where do you live? Where is your home?

A. Avila Beach, California.

Q. How long have you lived there?

A. Approximately four years now.

Q. Mr. Del Rio, were you in Avila on the day there was an explosion on the fishing boat Santa Lucia in September, 1954? A. Yes, sir.

Q. And at that time what was your work or occupation? Who were you employed by?

(Testimony of Rudy Del Rio.)

A. I was employed by Tony Sylvester.

Q. And what kind of work were you doing?

A. Diving. Abalone diving and salvage work.

Q. Now, on the afternoon of this explosion in September, 1954, did you hear an explosion at that time?

A. Yes, sir.

Q. And where were you when you heard an explosion?

A. I was on Front Street in Avalon.

Q. Now, Front Street, in reference to the ocean or the bay there, does that mean it was fronting the bay? [510]

A. That's right, sir.

Q. And how far were you away from the Union Oil dock or wharf at the time you heard the explosion, approximately?

A. Well, I don't know how far it is out there, but I would say possibly 600 yards, 500 yards, something like that.

Q. And did you hear more than one explosion?

A. No.

Q. You heard one explosion?

A. Yes.

Q. Can you describe the kind of noise you heard?

A. Well, it sounded like a plane going through the sound barrier, same kind of shocking explosion.

Q. Did you make any observation at that time out in the vicinity of the fishing boat Santa Lucia?

A. Yes.

Q. Will you just tell the Court what you saw at that time?

A. Well, I seen debris falling after the explosion and I seen smoke, black smoke, dark smoke, and then possibly a minute or so later I seen fire.

(Testimony of Rudy Del Rio.)

Q. Now, when you heard this explosion did you look out in the area of the fishing boat Santa Lucia?

A. Yes.

Q. Did you see any fire at that time any place?

A. Not right at the blast period, no.

Q. Were you able to determine or see where this debris was [511] coming from following the explosion?

A. Well, it was falling from the ship, so far as I could see.

Q. Then following that observation, hearing the explosion, at a later time you saw the fire, is that correct?

A. Yes.

Q. Where did you first observe flames or fire at any time in that area?

A. It was on the water. There was debris that was floating on the water. It was in the debris.

Q. And what did you do next?

A. Well, we jumped in a pickup and we went to the third pier to get on a boat to go render help.

Q. Now, you mentioned the third pier. What do you mean by "third pier"?

A. Well, there is three piers, the county pier, the Union Oil pier, and the third pier is the old Fort Sam Lewis Pier, I believe it is. Anyway, there's three piers there and it's the farthest one down to the west, and that is where our diving boat was anchored.

Q. What was the name of the boat?

A. Diving Bell.

(Testimony of Rudy Del Rio.)

Q. The Diving Bell? Is that the boat you worked on in the capacity of an abalone diver?

A. Yes. [512]

Q. Did the Diving Bell go to the scene of the fire? A. Yes; we did.

Q. And when you got to the area what did you observe at that time?

A. Well, the whole pier was on fire. Not the whole pier, but the section there, the loading terminal, was on fire, and the water and ship and everything else seemed to be engulfed in flames. That part of the ship that was above water all seemed to be burning.

Q. And what was the condition of the fishing boat? I mean by that, did it show any evidence of being broken or——

A. (Interposing): Oh, yes; the cabin section was floating in the bay there, next to the stern of the ship which was still out of the water. It never did actually sink there. The stern of it was above water.

Q. The stern was above water? A. Yes.

Q. And did you engage in fire-fighting activities, then? A. Yes; I did.

Q. That was aboard the Diving Bell?

A. Well, we came in on the Diving Bell and boarded the Union Oil tug Avalon and helped there as much as we could.

Q. Did you at any later time go to the Union Oil Company wharf or dock in the area of the serv-

(Testimony of Rudy Del Rio.)

ice station, the marine service station [513] installation?

A. Yes; after the fire we went up there.

Q. And did you observe the Diesel tanks and gasoline tanks on the service station dock at that time? A. Yes, sir.

Q. Could you determine whether or not, or did you make any observation whether or not those tanks were blown up or ruptured?

A. No, sir; they were still there in good shape, so far as I could see. Charred a little bit by fire burns, but so far as I could see there wasn't any cracks or anything like that on them.

Q. Now, did you have occasion at a later time to dive, make a dive into the wreck of the fishing boat Santa Lucia?

A. Yes; I did. I believe it was the following day.

Q. The following day? And at whose request did you do that? A. Dutch Van Haraveld.

Q. Who is Mr. Van Haraveld?

A. He was at that time an engineer for the Union Oil Company.

Q. This diving operation was conducted by you and someone else?

A. By Dutch Van Haraveld and Tony Sylvester.

Q. Did you procure or obtain a diving suit of some type?

A. Yes; a regular commercial abalone deep diving suit, deep gear. [514]

Q. And did you receive any instructions from

(Testimony of Rudy Del Rio.)

anyone as to what they wanted you to do or ascertain in making this dive?

A. Yes. Mr. Van Haraveld wanted to know the condition of the ship, and mainly the engine room section, and he wanted to know whether I could find some tanks, the fuel tanks, whether they were still intact or out or in condition, and I never did see anything like that.

Q. O.K. Now, did you—first, let me ask you, in what depth of water was the fishing boat Santa Lucia when you made the dive?

A. Approximately twenty-seven feet.

Q. And in what area was it in reference to the—I call your attention first to a sketch, Libelant's Exhibit 2, showing the service station offset and the Santa Lucia. Can you tell me whether or not the wreck was in that area or whether it was in a different position when you made the dive?

A. No; it was a little away from the pier at that time.

Q. And you say in twenty-seven feet of water? I assume you mean from the top of the water down to the bottom?

A. That's right.

Q. In other words, twenty-seven feet of water was in the area, approximately?

A. That is right.

Q. And did you go down alone or did someone accompany you?

A. No; I went down alone. [515]

Q. Just tell the Court, if you will, please, what

(Testimony of Rudy Del Rio.)

you did and what you saw when you made that dive.

A. Well, I came down and went in the bow section of the ship, and it was—the bow was split open. I walked in through there and I went down in the engine room section there, and there was a lot of debris there. There were some pieces of metal and ropes and boards and a lot of debris.

The ship was moving with the swell, and it was very murky and muddy down there and visibility was practically zero.

The Court: Were you able to get into the bow of the ship, below the deck?

A. Yes. I was right down on the bottom of it, bottom of the ship itself.

Well, I thought it was kind of dangerous in there, since I couldn't see what I was doing, and I couldn't see anything anyway and there wasn't any use in going in there, so I backed out and got out on the bow again on the port side, that would be. She was tilted in this position down.

I climbed through here like this, and the port section about four feet above the waterline was all ripped off clear up to about midships; and the starboard side was split in the bow, and the starboard side of the ship was leaning over like this. Well, it was almost coming off.

There was no deck up to about midships, or right off the cabin. There was no deck at all. Well, it was about [516] that time that I came up, and that was about it.

(Testimony of Rudy Del Rio.)

Q. (By Mr. Nave): All right. How much visibility did you have while you were down there?

A. Well, it all depends on what part. Down below in the hold, in the engine room part there, the visibility was—well, there was none hardly. You could feel things and maybe get up to within a foot from it and tell what it was. When I climbed up above the murky, muddy bottom, why, visibility was around three or four feet.

Q. Did you see any tanks, any gasoline tanks or Diesel tanks, at all in your inspection?

A. No. No; I didn't.

Q. You were unable to ascertain whether they were there or, if they were, what their condition was?

A. No. I don't know whether they were or weren't.

Q. Did you go down again? Did you make another dive?

A. Yes; I went down, I believe, the following day.

Q. And for what purpose did you go down the next day?

A. To see if I could find the bodies.

Q. Did you find any bodies? A. No.

Q. Now, on the second dive were you able to see any gasoline tanks or any tanks of any kind aboard the fishing boat? A. No, sir.

Q. Did you bring anything up—— [517]

A. (Interposing): No, sir.

(Testimony of Rudy Del Rio.)

Q. —from the fishing boat with you either on the occasion of the first dive or the second dive?

A. No, sir.

Q. Did you bring any part of any equipment that had been on the ship or that had been on the dock?

A. No; nothing at all.

Mr. Nave: You may cross-examine.

Cross-Examination

By Mr. Silvers:

Q. Mr. Del Rio, you were down on these diving efforts on two separate occasions, is that right?

A. That is right.

Q. Was the first time the day following the explosion?

A. I don't remember that. I know it was shortly after that. It might have been the second day or something like that. I don't remember.

Q. And whether it was the first or second day following the explosion, was the second time you went down the day following the first time?

A. That is right.

Q. Your instructions were received from Mr. Van Haraveld?

A. That is correct.

Q. How long were you down the first time all in all, according to your estimation? [518]

A. Well, the first time I was down about a half an hour, and the second time, which was the following day, possibly around the same time.

Q. Going back to the time preceding your dive,

(Testimony of Rudy Del Rio.)

when you first became aware of this explosion, you told us at the time of the blast when you looked toward the gas dock you were unable to see any sign of a fire at that time, is that correct?

A. Yes.

Q. Was your view obscured by smoke at the dock site? A. Well, yes; there was smoke, yes.

Q. Did you say the color was black or brown—dark brown? A. It was dark.

Q. It was a dark color? A. Yes.

Q. Did it seem to obscure most of the gas dock itself as you looked toward it?

A. Yes; it kind of made it that way, yes.

Q. You were able—and I am referring now to the time when you first turned to look in the direction of the blast—you were able at that point to see the Santa Lucia, were you not?

A. Part of it, yes.

Q. Which part?

A. Well, pretty hard to tell. I just seen part of it. The stern—the bow was already going down, and it was—the [519] only part actually that I could see was the floating cabin that was there and the stern.

Q. You carried with you no means of illumination when you went down on your dives?

A. No.

Q. I am not familiar with diving details. Is it possible at that depth to take some sort of marine flashlight, or whatever you call it? A. Yes.

Q. And that is, I suppose, a fairly commonplace piece of equipment, is it not?

(Testimony of Rudy Del Rio.)

A. Well, a light down there wouldn't have done a bit of good.

Q. You mean by that that it would not have been able to penetrate the kind of darkness that you were finding down there?

A. That is right. It was muddy water.

Q. Yes.

A. The bottom there is all mud and when you walk on it you sink approximately up to your ankles. If you stand there in any one spot for a minute, you will find that you are halfway to your knees.

Q. This is if you are standing on the mud bottom itself? A. Yes.

Q. But the ship and its remains were resting on that mud bottom? [520]

A. That is correct.

Q. You entered the ship, if I understood you correctly, through a split in the bow? A. Yes.

Q. You were then, were you, standing on the deck?

A. Well, yes. I was not on the deck. It would be——

Q. Withdraw that. I mean you were standing, were you not, on the deck of the engine room?

A. Yes. Yes; I was.

Q. And it is your recollection that you were still unable at that point to see more than—well, I think you said your visibility was just about zero at that point? A. That is right.

Q. And you could only become aware of objects by touching them or bumping into them, is that

(Testimony of Rudy Del Rio.)

right? A. That's right.

Q. And it is your theory that under those conditions a marine flashlight would not have aided you at all in seeing what was around you, is that correct?

A. No; the open bow of the ship was doing like an accordion—like with the swell of the ocean, and it had been gushing and creating a turbulence and bringing up this mud from the bottom.

Q. Was the condition of visibility essentially the same on your second dive the next day?

A. Yes. [521]

Q. I think you said in the area above the engine room you did have visibility of some three or four feet? A. Yes.

Q. Now, exactly what area are you referring to?

A. Well, visibility was better anywhere above six feet from the bottom. It was better there because the mud wouldn't come up that far under those conditions. Where I was able to see and feel my way around was on the port side of the Santa Lucia. In other words, I was climbing up on it above the bottom and climbing along the port side clear along about amidships.

Q. Do you know whether at any time as you were proceeding in that direction, in this area, do you know whether you were actually at any part of the main deck on the port side of the vessel?

A. No; there wasn't no deck.

Q. I thought you said—I may have misheard

(Testimony of Rudy Del Rio.)

you—I thought you said you don't recall finding any deck up to about midships. Is that correct?

A. That's right.

Q. Did you go beyond the midship point?

A. No.

Q. Was there deck beyond the midship point?

A. Yes. Yes; there was.

Q. I take it you informed Mr. Van Haraveld at the conclusion of your first dive that the visibility conditions were so bad [522] so far as the engine room was concerned that you were unable to make out anything, is that right? A. That is right.

Q. And, of course, you told him you hadn't found any gas tanks or fuel lines or anything he had asked you to look for?

A. No, sir; I did not find any.

Q. How long did the Santa Lucia remain in that area?

A. Well, I don't remember. I know it was there, oh, possibly a week or something like that.

The Court: Was it towed away then?

A. Yes; then it was towed away.

Q. (By Mr. Silvers): Do you know who towed it away, Mr. Del Rio?

A. Well, I believe it was the Army Engineers or some outfit like that.

The Court: Was it ever floated, do you know?

A. It never did sink there in the Bay. The bow was on the bottom, but the stern was afloat and when it was towed out—when they towed it out of there, I imagine the bow was still dragging the bot-

(Testimony of Rudy Del Rio.)

tom as they towed it away, because it was in the same position, headed down in this position with the stern up. I don't know if they floated it up any further to tow it out or not, but I know it never did go all the way down while it was in the Bay.

Q. (By Mr. Silvers): Did you ever observe on either [523] of these two diving efforts the section of the portside of the main deck of the vessel anywhere in the area of the wreck?

A. On the portside?

Q. I am referring to the deck you found missing when you were actually in the boat. Did you see it floating around anywhere, or what appeared to you to be that portion of the deck?

A. No, sir; there was no deck on either the port or starboard side up as far as midship.

Q. Did the deck aft of that appear to be relatively intact?

A. Yes; as far as I could tell, yes.

Mr. Silvers: Thank you.

The Court: Have you any further examination?

Mr. Vartan: Just one question, your Honor.

Cross-Examination

By Mr. Vartan:

Q. Did you ever see the crew of the Santa Lucia after the blast?

A. I seen them in a little lifeboat, going toward the County Pier right after the blast.

Q. Did you see them getting off of the Santa Lucia into the lifeboat?

(Testimony of Rudy Del Rio.)

A. No; I didn't see them getting off, no.

Q. So you don't know whether there was flame on the Santa Lucia at that time or not, do you?

A. Well, I don't know what time they got off of there. [524]

The Court: When you went underneath and inspected the ship under the water, did you find evidence of fire aboard?

A. No.

The Court: I don't mean did you find flames. Did you find charred wood aboard the ship?

A. No. No; I didn't see any charred wood at all.

Q. (By Mr. Vartan): Mr. Del Rio, by the way, did the man from Union Oil who asked you to dive ask you or instruct you to look for any gasoline or Diesel oil nozzles belonging to the gas dock?

A. No, sir; I don't recall that. No; he told me to go down and see the condition of the ship and see about these fuel tanks.

Q. I see. Are you familiar, Mr. Del Rio, with the depth of the water right at the edge of the gas dock?

A. Yes.

Q. Will you tell us what that is?

A. Well, it varies with the tide, but it is usually right around twenty-five or thirty feet.

Q. Now, I show you a group of Respondent's Exhibit K, which purports to be the condition of the gas dock after the explosion. Now, you testified that the tanks were in good shape, and so forth. Is that the condition in which you observed the gas lock?

A. Yes. Yes. [525]

(Testimony of Rudy Del Rio.)

Mr. Vartan: I think you have seen these, your Honor?

The Court: Yes.

Q. (By Mr. Vartan): How long did you say the Santa Lucia was there before it was towed away?

A. Well, now, you can't quote me on that. I don't really know. I am just guessing. I know it was there several days.

Q. All right. During the several days that you know it was there it was in the vicinity of the Union Oil wharf, was it not?

A. Yes.

Q. Were you instructed to examine the vessel after it was towed away?

A. No, sir.

Q. Do you know where it was towed to?

A. Out in deep water, is all I know. I don't know where.

Q. Well, you don't know whether it was towed out into deep water or not of your own knowledge, do you?

A. Well, the thing is that they certainly wouldn't sink it in shallow water. I know it had to go out in deep water to be sunk.

Q. Well, I had in mind, Mr. Del Rio, possibly it was towed in and salvage made of it; do you know that of your own knowledge? I mean, do you know if the engines were recovered or things of that kind? [526]

A. No. No; so far as I know the engine, as a matter of fact, is still sitting right there where it blew up.

(Testimony of Rudy Del Rio.)

Q. You mean in the deep water?

A. No; it's there right near to the Union Oil pier. The engine was there.

The Court: The engine fell through the hull?

A. The engine come out, came off the ship, and it is laying on the bottom. I did see that engine on my second dive there.

Q. (By Mr. Vartan): Now, the second time that you dove——

The Court: Excuse me. Did you note the relationship of the engine as it lay there on the bottom with reference to the hull of the ship?

A. It was right in front, right in front of the bow and possibly, oh, fifteen feet ahead.

The Court: Fifteen feet forward of the bow?

A. Yes.

The Court: And did you notice its relationship to the stem of the ship, the stem of the ship, the front of the bow?

A. Well, it was right in front of it.

The Court: Was it over toward the dock or away from the dock?

A. No; it was away from the dock.

The Court: Toward the starboard side of the harbor? [527]

A. That's right.

The Court: About how far away from the stem of the ship was it?

A. Just about fifteen feet, sir.

The Court: All right.

Q. (By Mr. Vartan): Mr. Del Rio, when you

(Testimony of Rudy Del Rio.)

dove the second time, I believe you said to look for the bodies, what area did you dive to to look for the bodies?

A. I went all around there, all around the area there about 150 feet in circumference.

Q. Were you near the pilings of the gas dock?

A. Yes; I was near them.

Q. Was visibility good? A. No.

Q. Did you have a light? A. No, sir.

Q. Were you walking or swimming?

A. I was walking on the bottom.

Q. Occasionally did your feet touch any hard objects on the bottom in the mud? A. Yes.

Q. And did you pull those up and look at them to see what they were?

A. No. They might have been blocks or something. I don't know. [528]

Mr. Vartan: That is all.

A. I know I kicked a bucket once.

Q. You kicked a bucket at one time?

A. Yes.

Mr. Vartan: That is all.

Recross-Examination

By Mr. Silvers:

Q. Mr. Del Rio, I am going to show you——

Mr. Silvers: Counsel, I am referring to this, which you have a copy of.

Q. I am going to show you a photostat of a type-

(Testimony of Rudy Del Rio.)

written document which bears the signature "Rudy Del Rio." Is that your signature?

A. Yes, sir.

Q. Did you make a report of your inspection by diving to the Union Oil Company, and does this statement which I have showed you contain that report?

A. Yes, sir.

Q. Are those your words in the report or somebody else's?

The Court: Counsel, it is my practice once a paper is shown to the witness to have it marked for identification.

Mr. Silvers: Yes, sir. Thank you.

The Court: I suggest you have this document marked for identification. [529]

(Typewritten statement of witness Del Rio marked Respondent's Exhibit M for identification.)

Q. (By Mr. Silvers): I notice that this document, Mr. Del Rio, is signed, and underneath the signature is the date November 3, 1954, is that right?

A. Yes.

Q. And then under the date line is the signature, "Donald J. Van Haraveld"?

A. Yes.

Q. That is the Union Oil man who instructed you to make the dive?

A. Yes.

Q. All right. And did he ask you when you came back to give him a full report of everything you found?

A. That is right.

Q. And this statement contains that?

(Testimony of Rudy Del Rio.)

A. Yes.

Q. Now, I was curious, Mr. Del Rio, to ask you this: Why is there no reference at all to the second dive in this statement?

A. Well, I don't think that the same people requested me to go down the second dive. I don't really know who it was, or anything, but I worked for Tony Sylvester and I got my orders through him, and I don't know who it was requested I go down the second time. [530]

The Court: Do you intend to offer that in evidence?

Mr. Silvers: We will offer this in evidence, yes, your Honor.

The Court: Any objection?

Mr. Vartan: No, your Honor.

Mr. Nave: No objection.

The Court: In evidence.

(Document heretofore marked Respondent's Exhibit M for identification admitted into evidence.)

Q. (By Mr. Silvers): Did you call to Mr. Van Haraveld's attention on November 3, 1954, when you signed that document, that it contained no reference whatsoever to your second dive?

Mr. Nave: I object to that, if your Honor please, as argumentative.

The Court: Overruled.

A. Will you repeat that question, please?

(Testimony of Rudy Del Rio.)

Mr. Silvers: Would you read that back, please, Mr. Reporter?

(Question read by the reporter.)

A. Well, I don't know if I mentioned it or not, but—no, I don't believe I mentioned it.

Q. (By Mr. Silvers): Did you sign any other written report, Mr. Del Rio—

A. No, sir. [531]

Q. —of your diving efforts?

A. No, sir.

Mr. Silvers: That's all.

Mr. Nave: That is all.

The Court: Thank you.

(Witness excused.)

Mr. Nave: May this witness be excused, your Honor?

The Court: Yes, sir.

Mr. Nave: Mr. Johnson.

LESTER JOHNSON

called as a witness by the respondents, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name to the Court.

A. Lester Charles Johnson.

Direct Examination

By Mr. Nave:

Q. Mr. Johnson, how old are you?

A. 50 years old.

(Testimony of Lester Johnson.)

Q. And where do you live?

A. I live in Avila Beach, California.

Q. How long have you lived there?

A. I have lived there twenty-nine years.

Q. By whom are you employed?

A. What is that? [532]

Q. Who do you work?

A. Union Oil Company of California.

Q. For how long have you been employed by them?

A. Twenty-eight years and eight months.

Q. Are you still employed by the Union Oil Company? A. Yes.

Q. And what is your present occupation or position? A. Assistant foreman.

Q. I call your attention to an explosion and fire in September, 1954, at Avila involving the fishing boat Santa Lucia. Were you there at that time?

A. I was on the wharf, yes.

Q. And what was your position then? I mean, what was your job? What were you doing?

A. Assistant foreman.

Q. Where were you at the time of the explosion?

A. I was in the office building.

Q. I call your attention to Libelant's Exhibit 2 on the blackboard showing a wharf, the position of the Santa Lucia. The office you mention is at the end of the wharf as shown here on this sketch?

A. That is right.

Q. And was anyone in the office with you at the time the Santa Lucia came into the wharf?

(Testimony of Lester Johnson.)

A. No. [533]

Q. When did you first see the fishing boat Santa Lucia that day?

A. I first saw her when she was approaching from the sea toward what we call Berth 4 on the east side of the wharf.

Q. And the Tanker Lompoc was in the area shown on Libelant's Exhibit 2? A. Yes.

Q. Now, when the Santa Lucia came in from the sea at that time, was there anyone else in the immediate area besides yourself?

A. Charles Caldwell. He was on the outside of the office toward the west side.

Q. What were you doing in the office at that time generally?

A. I was making notations in the log book of the operations. We had just shut down one commodity of oil and were starting to load another commodity.

Q. That's in respect to the Lompoc?

A. On the Lompoc, yes.

Q. Did you hear any conversation between Mr. Caldwell and anyone aboard the fishing boat Santa Lucia at that time?

A. The window was open and I heard someone call for gasoline, and Caldwell was pointing and told him, "down the wharf," toward the big "76" sign which we had there.

Q. Did you hear any particular conversation? Were you able to determine what was said in particular or just hear [534] somebody speak of gasoline?

(Testimony of Lester Johnson.)

A. That is all I heard. Just gasoline, whether "we want gasoline" or just "gasoline," I don't know.

Q. Did you see Mr. Caldwell leave the area of the office following that?

A. Mr. Caldwell came into the office and picked up his sales book and cash box and went out and went on down to the gas station.

Q. Did you remain in the office at that time?

A. I did.

Q. Did you make any observation at that time as to what was going on down in the area of the fishing boat Santa Lucia? A. No.

Q. Did you hear any noise some time following that? Did you hear an explosion?

A. Well, approximately five minutes later after the boat approached the sign I heard an explosion or a big rumble, boom like. It was just like, well, I couldn't tell exactly where it came from or anything. It was just an explosion or a boom.

Q. All right. And were you in the office when you heard this explosion? A. Yes.

Q. You don't know how long it was exactly after the fishing boat came into the dock that you heard this explosion, do you? A. No. [535]

Q. Is there a window in the office where you were that faces toward the Marine Service Station?

A. The office is completely enclosed in glass. It is enclosed in glass all the way around. There is an open door on the west side and open windows on the west side and east side, which both windows were open and the door was open.

(Testimony of Lester Johnson.)

Q. All right. Now, this explosion you say you heard, was that a series of sounds or one boom or two booms, or what was it?

A. No, to me it was just one boom and it was quite strong.

Q. One boom, quite strong. Did you make any observation in the area following hearing this boom?

A. I immediately looked out to sea. We had some boats up here that were making soundings with black powder, a survey, and it was approximately the same kind of a boom but much larger. And then I looked toward the Lompoc to see if there was anything amiss there, and apparently there was nobody moving or hollering, so I knew that nothing happened there. I then went to the door, and outside the door where I could look toward the gas landing or gas station, and I saw the smoke coming up from where the Santa Lucia was.

Q. Did you observe any fire any place at that time?

A. At that time, no.

Q. What did you notice? What did you do next?

A. I returned to the office, and by that time the two men [536] that were in the back room just finishing their dinner came out and I instructed them to close everything down, that is, close off the hoses for the crude oil to the Lompoc.

Q. Then what did you do next?

A. Then I returned outside and started toward the smoke. By that time there was fire. And I met Mr. Caldwell about the after part of the chain

(Testimony of Lester Johnson.)

room. We have a remote control there to start our fire engine. I went over to turn the crank on that, at the same time that Caldwell was there, and he asked me if he was burned badly, and I told him he looked like it, and he went into the office and I stayed right there in that area until Caldwell came out. I don't know what he did.

Then we both of us started down the wharf toward the shore end. I met Mr. St. John at the time and told him—Eldon St. John—to come with us, and we went down the wharf through the smoke, and Caldwell continued on down the wharf, and I instructed St. John to turn a marker on, a fire marker that we have on the fire line, and to keep the tanks cool and that he would have help soon.

Then I went back to the smoke up to the main part of the wharf where the ship's crew were breaking out—well, had already broken out the fire hoses and was beginning to hook them up to the fire lines.

Q. All right. Now, Mr. Johnson, when you first saw any fire or flames in the area, can you tell how long after you [537] heard the explosion it was you first saw any fire or flames anywhere in the area?

A. Oh, I would say probably three or four minutes.

Q. And when you first saw fire or flames, where did you observe them?

A. Well, it was down in the area of the boat, of the Santa Lucia, on the outer part of the landing.

Q. Now, when you first met Mr. Caldwell, where was he when you first saw him after the explosion?

(Testimony of Lester Johnson.)

A. He was just aft of the chain room, somewhere in the area where the chain room was, something—somewhere in that area.

Q. And were you able to see what, if any, his injuries or what his appearance was at that time?

A. Well, his appearance then was that he had a—well, on his forehead he had a bloody spot like he had been hit with something, and then the rest of his face looked it was sort of—like it had been shot with a shotgun or something, just scattered. The blood wasn't running, but it was apparent. It was on his face.

Q. Then following what you have detailed to us, did you do anything in reference to fighting the fire?

A. After I returned I went up to the office again and was going to call—I think I made the call before that, though, before Caldwell came, called the plant and also called my foreman [538] at the time I returned to the office after seeing that. Then when Caldwell—what was that question, again, please?

Q. If you fought fire.

A. Afterwards, yes. After I returned, I returned to the office and looked around. I don't know exactly what I did, but then I returned back to the after part of the chain room where I met one of the mates of the ship and I told him, "I think you better get out of here," and he turned to his ship then and called to his men and they all left for the ship, and I went down and took over one of the fire-

(Testimony of Lester Johnson.)

hoses. There were three men there then and I was the fourth one.

Q. And by that time over what area could you observe any fire or flame?

A. At that time from where we were standing the fire seemed to be coming from the ship, from the Santa Lucia, and we were behind the building, and——

Q. What building do you mean?

A. The warehouse building.

Q. The Marine Service Station?

A. Yes, the Marine Service Station, right.

Q. All right. Go ahead and tell what you observed.

A. Then we directed our water from our fire-hose over the top of the warehouse and toward the outer side, the outer edge, all over that area.

Q. Could you see the gasoline tanks and the Diesel tanks [539] that were on the Marine Service Station when you were in that position?

A. Yes.

Q. Did they show any signs of being blown up or ruptured?

A. No.

Q. Then you continued to fight fire?

A. Yes. After, well, maybe twenty minutes or something like that I instructed one of the men to take the tug Avila away from the wharf and stand by and I took over his place on the hose.

Q. Were you doing any fire-fighting at that time in reference to the Santa Lucia or were you directing your attention to the dock?

(Testimony of Lester Johnson.)

A. To the dock?

Q. Yes.

A. We were just covering the whole area of the warehouse and over the top toward the Diesel tanks and the gasoline tanks, all that area that we could reach with the water.

Q. There was a fire in that area at that time?

A. Yes.

Q. Following the—well, first let me ask you, how long was it—or what time was it approximately when the fire was extinguished?

A. When the fire started?

Q. No, when it was extinguished; when you had the fire out. [540]

A. Oh, eight o'clock. Eight p.m.

Mr. Nave: (Showing document to Mr. Silvers.)

Mr. Silvers: I have no objection.

Q. (By Mr. Nave): Mr. Johnson, I show you a blueprint or sketch which I will ask you to examine. Will you state whether or not that is a true and correct representation of the Marine Service Station installations, of the pipelines and tanks, and the position of the fishing boat Avila at the time of this explosion and fire?

A. Yes, this looks like it.

Q. You are familiar with the location of the tanks that are marked there as "Gasoline" and "Diesel" and "GM Diesel"?

A. I am.

Q. And you are familiar with the location of the pipes which are shown there in reference to those tanks?

A. Yes.

(Testimony of Lester Johnson.)

Mr. Nave: We offer this simply for the purpose of illustration.

Mr. Silvers: Your Honor, we would object to certain portions of the diagram which Mr. Nave has not yet referred to, allegedly taking some individuals, including the decedent Frank Cardinale, at the time of the explosion, and a number of other unidentified individuals at the time of the explosion.

The Court: Let me see it. [541]

Mr. Nave: (Handing document to the Court.)

The Court: Yes, we have had no evidence as to this from any witness.

Mr. Nave: I am not offering that. I am only interested, your Honor, in illustrating the equipment, the pipes, and the position of the various inanimate objects.

The Court: Suppose I receive it for that purpose and that purpose only. We have had testimony as to the location of where the waterhose and the gasoline hose was located on this projection of the dock. This more graphically presents it.

Mr. Silvers: Very well.

The Court: I will receive it only for that purpose, for the purpose of showing the structural positions aboard the dock and the relative positions of the ship at the time of the explosion and following the explosion.

(Document referred to admitted into evidence as Respondent's Exhibit N.)

(Testimony of Lester Johnson.)

Mr. Nave: Your Honor, may we have a recess at this time?

The Court: Yes.

Mr. Silvers: Your Honor, I didn't have an opportunity immediately after you stated for what purpose this was to be introduced to enter my objection with reference to the location of the ships. We are not conceding or stipulating that the tugs Avila and the Santa Lucia—— [542]

The Court (Interposing): Oh, I understand. Your position is that the Avila was in the position as illustrated on this Libelant's Exhibit 2?

Mr. Silvers: That is correct.

The Court: The Union Oil maintains that it was more to the outer portion of the dock. That has been pointed out before, and I have in mind the various contentions. This represents the contention of the oil company as to where this tug was located on the dock.

Mr. Nave: Yes.

The Court: Do you want a recess?

Mr. Nave: Yes, your Honor.

The Court: All right, we will have a recess for ten minutes.

(Short recess.)

Q. (By Mr. Nave): Mr. Johnson, did you at any time make an examination of the service station installations shown here on this map, Respondent's Exhibit N, in reference to the diesel tanks, the gasoline tanks and the lines that run from them?

(Testimony of Lester Johnson.)

A. Inspect them?

Q. Yes.

A. Yes, the next morning after the fire.

Q. Now, first in reference to a tank marked "GM Diesel" shown on the service station dock, what is the approximate [543] capacity in gallons of that tank? A. 2,600.

Q. Now, the "76" gasoline tank that is shown in the sketch, what is the capacity of that tank?

A. That is the same, 2,600.

Q. The diesel oil tank shown in this sketch, what is its approximate capacity? A. 1,000 gallons.

Q. Now, did you observe and inspect the GM diesel tank itself? A. After the fire?

Q. Yes. A. Yes.

Q. And what did you find the condition to be as to whether there were any ruptures or holes in it?

A. There were no holes or ruptures. The only condition was the burned paint on the outside of the tank.

Q. Was there still fuel in the GM diesel tank, if you know? A. Yes, there was.

Q. Now, as to the "76" gasoline tank, did you make an inspection of that tank? A. Yes, sir.

Q. What did you find the condition of that tank to be?

A. That tank was in a little better condition than the GM diesel tank, but toward the south side the paint was blistered [544] and burned, too.

Q. Did you see any signs of holes or signs of an explosion in either of those tanks? A. No.

(Testimony of Lester Johnson.)

Q. Was there any gasoline still in the "76" gasoline tank? A. Yes.

Q. Do you know the amount of gasoline that was in the tank?

A. Not exactly, but I think there was possibly a thousand gallons in it.

Q. Now, the remaining tank here, marked "Diesel Oil," did you make an observation and inspection of that tank following the fire? A. Yes, sir.

Q. This inspection you made when?

A. That there inspection was made, well, oh, I should say, around between eleven and twelve o'clock next day.

Q. What did you observe as to the condition of the diesel oil tank at that time?

A. The diesel oil tank was resting on 12x12 blocks, and on the outer edge the 12x12 blocks had been burned, and it was on a slope.

Q. Did you see any signs of holes or ruptures in that tank? A. No.

Q. Was there still oil in that tank?

A. Yes, there was oil in it. [545]

Q. Now, the pipeline—let me ask you first, the pipeline that runs from the GM diesel tank as per the sketch goes over to the edge of the dock, is that right? A. That is right.

Q. Did you inspect those connections, the pipe, the fittings and the connections? A. Yes.

Q. And what did you find to be the condition of the pipeline, the fittings and the connections?

(Testimony of Lester Johnson.)

A. Outside of being—looking like they had been hot, they were still intact, not leaking.

Q. Was there any leak anywhere on any of the pipes, fittings or connections or any of the tanks that are shown in this sketch?

A. No, there wasn't, no.

Q. Or any other pipes, fittings or tanks that were on the Marine Service Station Terminal, that you know of?

A. No, there were no leaks.

Q. What size pipe connection is there that runs to the GM diesel toward the dockside?

A. Well, immediately out at the GM diesel there is a three-inch pipe that has a three-way valve on it, and it goes down to a two-inch and over to the meter where it was reduced down to an inch and a half, and then from the outer side of the meter towards the hose it is an inch and a quarter to the hose.

Q. Was there a hose nozzle that is used in lowering and [546] raising the fueling nozzle from the GM diesel tank?

A. Yes.

Q. Is there a hose reel, you say?

A. Yes, there's a hose reel.

Q. Is that a separate hose reel from the one that is used in handling the gasoline, the "76" gasoline?

A. Yes, it was an independent hose. It was separate.

Q. Now, this GM diesel, what type of diesel is that? What is it used for?

A. It is used for a high compression diesel. It is about the same color and substance as the kerosene would be.

(Testimony of Lester Johnson.)

Q. Now, the "76" gasoline, is that the regular commercial white gas?

A. That's the regular commercial gas.

Q. What kind of fuel is in the other tanks, the remaining tanks of the diesel?

A. That's what we call a domestic diesel. It is a real dark diesel.

Q. And what is it used for?

A. It is used for most of the larger diesel engines. Not the—well, they are high compression, all right, but they burn a heavier fuel.

Q. Now, a connection that runs from the "76" tanks, as shown on this sketch, Exhibit 9 here, what is the size of that line?

A. That line that is coming from the tank is a three-inch [547] opening with a three-way valve, and then it is reduced to two inches and is two inches clear up to the meter connection.

Q. And is the size of the pipe of the GM diesel tank at the meter the same as on the "76" gasoline?

A. That's right.

Q. Now, the hose reels, are they both the same size as used on the GM diesel at the gasoline?

A. That is right.

Q. Now, the nozzles that are used there, do you know if they are the same or different sizes?

A. They were the same; same size nozzle.

Q. I hand you Respondent's Exhibit J, which is a spring type gasoline nozzle, and I will ask you, is that the type of gasoline nozzle and mechanism that was on the gasoline hose running from the "76"

(Testimony of Lester Johnson.)

tank to the edge of the dock? A. Yes.

Q. I call your attention to the red hose attached thereto. Is this the type of hose that was used on the gasoline hose at the time of this explosion and fire?

A. It is.

Q. You will notice in this exhibit there are some wires. Are those the same type of wires in the gasoline hose that were in use at the time of the explosion? A. It is.

Q. Do you know what the purpose of these wires are? [548]

A. The purpose of those wires is to reinforce the hose and also act as a grounding wire.

Q. Now, during the twenty odd years you have been employed at Avila, I will ask you if this is the standard type of gasoline hose that was used at the Marine Service Station. A. It is.

Mr. Vartan: Just a moment before you answer that. Your Honor, as I understand the question, it is the standard type used at Union, but that doesn't make it one way or the other.

The Court: Well, common sense tells me, and tells you if you look at it, it is the standard type used in all service stations when we pull up to get gasoline.

Mr. Vartan: No, I was referring to the——

The Court (Interposing): All right, let him answer. Objection overruled. Have you been using a nozzle of this type for your gasoline hose ever since you have been there? A. Yes, your Honor.

The Court: Now, there is another nozzle that is

(Testimony of Lester Johnson.)

used, is there not, where gasoline is delivered under pressure and stops flowing and the motor that pumps it stops operating when the gasoline tank is filled? Have you seen such an object?

A. I believe there are such nozzles that they have in service stations, that is, for cars, that if you put the nozzle into the tank, when the gasoline reaches a certain point it [549] automatically shuts off, but we have never used one of those in the time that we have been down there.

The Court: Have you ever seen those used on docks which make sale of gasoline to marine vehicles? A. No, your Honor.

The Court: All right. Proceed.

Q. (By Mr. Nave): Now, Mr. Johnson, I may have asked you this. I want to be sure I have covered it. You examined all the tanks? You also examined all the pipes, connections and fittings?

The Court: I think you went over that. He said all pipes, tanks—no leaks.

Mr. Nave: All right. I just wanted to be sure.

The Court: I think we went over that very carefully one by one.

Q. (By Mr. Nave): Now, Mr. Johnson, I call your attention to a photograph in evidence marked Respondent's Exhibit B, which purports to be a photograph taken from the water side facing the pilings of the Marine Service Station dock, and I call your attention to the piling on the far end of the picture, the last one over there, which you will see is bent in instead of being straight up and down. I will

(Testimony of Lester Johnson.)

ask you if you had observed that piling following the explosion and fire. A. Yes, I did.

Q. And that piling which is shown in this photograph in [550] this condition as being bent in, was that piling in that position prior to this explosion?

A. No.

Q. Now, the pilings that are shown here in the photograph, did you examine those pilings following the explosion and fire? A. Yes.

Q. Did you also observe the under side of the deck or dock? A. Yes.

Q. And what did you see? What was your observation as to any signs of explosion or burning there?

A. It showed where it had been charred. It burnt completely through the deck, the part there, and all the decking showed burned partly. Taking it from this photograph, it don't show as much of the burning, because it is from the warehouse side and also the stern part of the Santa Lucia, which was facing this way.

From this corner of the piling, but this way, coming from that on this side, you can see where it is all charred.

Q. Now, the tug Avila as shown on this sketch, Respondent's Exhibit N, is that the Avila ship which belonged to the Union Oil Company?

A. It is.

Q. And on Libelant's Exhibit B—Libelant's Exhibit B, you will notice the position as shown here of the Avila. A. Yes. [551]

(Testimony of Lester Johnson.)

Q. Do you know where the Avila was actually moored at the time of the fire?

A. Yes, the Avila was moored about opposite the offshore. It would be about opposite the offset on the wharf.

Q. Are you familiar with the fact that there is a ladder that goes down from the offset in the area where the Avila is anchored or moored?

A. I am.

Q. And as shown on Libelant's Exhibit 2, the circle here marked "Ladder GR," is that the approximate location? A. Yes.

Q. And where was the Avila with reference to this circle?

A. The Avila would be about midships of the—midships on the Avila would be where the ladder comes up.

Mr. Nave: Thank you. You may examine.

Cross-Examination

By Mr. Silvers:

Q. Mr. Johnson, you are familiar and were at the time of this explosion with the instructions that the Union Oil Company gave its employees at this installation concerning fueling of vessels like the Santa Lucia, isn't that right?

A. That is right.

Q. And part of the instructions of the Union Oil Company in that regard was that a fishing boat of the Santa Lucia type was to have delivered to it the

(Testimony of Lester Johnson.)

amount of gas that the boat [552] asked for, isn't that right?

A. If they asked for a certain amount of gasoline, and I mean if they asked for so many dollars worth, you would look on your chart and give them so many dollars worth, how many gallons that would be that they asked for. If they asked for the exact amount of gasoline or diesel, or whatever it was, you would give it to them.

The Court: You mean a fisherman coming up and buying a certain amount of gasoline for fuel?

A. That's right.

The Court: Some of them don't want to put any more money in?

A. Some of them don't have the money, and some of them don't take it.

The Court: So it is your custom, then, and the men aboard the ship were accustomed that if they wanted thirty gallons, you gave them thirty gallons and no more?

A. That's right.

Mr. Vartan: May I have the page number, Mr. Reporter?

The Reporter: Page 16.

Q. (By Mr. Silvers): Now, there was a warehouse on the gas dock which was essentially destroyed in the fire and explosion, and shown here on the exhibit, Libelant's Exhibit No. 2. [553]

A. The warehouse, yes.

Q. And what did that warehouse have in it——

A. That warehouse——

Q. ——at the time of this fire and explosion?

(Testimony of Lester Johnson.)

A. It had lube stock, lube oil, barrels of lube oil, one barrel of kerosene——

Q. It had a barrel of kerosene?

A. One barrel of kerosene.

Q. Where was the barrel of kerosene located?

A. I couldn't tell exactly, but it was on the inside of the warehouse.

Q. In addition to the barrels of lube oil and the barrel of kerosene, what else was in the warehouse?

A. There was one barrel of what we call appliance fuel. That is a fuel that is for gasoline lanterns or gasoline stoves where they want a white gasoline with no color in it.

Q. Now, you have told us what remained of the contents of the big tanks of diesel and "76" gas and GM diesel outside the warehouse that I have just referred to. Now, what, if anything, was the condition of the stocks of fuel that you have just described in the interior of the warehouse after this explosion and fire?

A. They was, I would say, about three barrels probably had broken open from the heat, and they was some of the lube stock left. There was others that had broken open and fallen through [554] the floor that was absolutely destroyed.

Q. Was there any kerosene or appliance fuel left? A. No.

Q. Does this photograph which I am showing you now correctly show the Santa Lucia, what remains of her after the fire and explosion, and the

(Testimony of Lester Johnson.)

tug Avila that was involved in the firefighting episode? A. Yes.

Q. You actually saw that scene yourself, did you? A. No, I did not see it.

Mr. Silvers: We will offer this in evidence, your Honor.

The Court: What is this supposed to be? The scene at the time of the fire?

Mr. Silvers: Immediately. The ship is still burning.

The Court: Any objections?

Mr. Nave: No objection.

The Court: It may be received in evidence.

(Photograph referred to admitted into evidence as Respondent's Exhibit O.)

Q. (By Mr. Silvers): Is that man on the Avila with a cigarette in his mouth a Union Oil employee?

A. I would have to look at that to see who it is.

Q. Do you know approximately how long after the fire and [555] explosion that photograph was taken?

A. No, I don't, because as soon as I was relieved on the hose when the fire was practically out, as soon as I had relief on the hose I went back to examine the cargo hoses from where the Lompoc had pulled out, to see if they was—to see if the lines were holding, if there was any oil on the water, and then after I made my inspections I came back to the fire, but by that time we had relief and the fire was practically under control. I was around in that area

(Testimony of Lester Johnson.)

and then I went back to the office where I changed clothes. So at the time this photograph was taken I wasn't there.

Q. Very well.

A. (Continuing): The man that is on the top side of the boat here is a Union Oil employee, yes.

The Court: Who produces this picture?

Mr. Silvers: I think we obtained it from the Union Oil Company.

Mr. Nave: These are photographs that were taken by a commercial photographer in the area after the fire and explosion and we supplied these to counsel.

The Court: This last photo was supplied by the Union Oil Company, then?

Mr. Silvers: Yes. They were not taken by us; they were taken by a commercial photographer.

Mr. Vartan: Wasn't that a local newspaperman who [556] was on the job?

Mr. Nave: I think that's right. We supplied counsel in the other case with copies and they had these enlarged.

Q. (By Mr. Silvers): Were all the items that were salvageable and recoverable that were found on this gas dock after the fire, to the best of your knowledge, collected for that purpose by the Union Oil Company?

A. Yes. What was salvaged?

Q. Yes.

A. Well, yes, they was salvaged.

Q. You made whatever use you could of what-

(Testimony of Lester Johnson.)

ever equipment and fuel oil remained, isn't that correct? A. Yes.

Q. I am going to show you next, Mr. Johnson, Respondent's Exhibit D in evidence, and I call your attention to the objects shown in the top center of that photograph. Is that the reel on which the gasoline hose that was used to fuel the Santa Lucia was rolled just before this fire and explosion?

A. Yes.

Q. Is part of the gas hose that was used to fuel the Santa Lucia at the time of this fire and explosion still shown in that photograph attached to the reel?

A. Yes, there is the coupling part that the hose is fastened to is shown here on the reel. That is your brass fitting that [557] screws in.

Q. Is there anything except that brass fitting or coupling that is shown on the photograph as still being attached to the reel?

A. I don't see it in this photograph.

Q. There is no portion of the hose itself?

A. No, there is no hose.

Q. Do you know where the couplings or fittings that you have just referred to are at the present time? A. No, I don't.

Q. Do you know what happened to that after the fire and explosion?

A. Well, several days or a week, probably, after that when we began to break down the pipeline, there is a sort of a stockpile up to the Avila pump station there.

Q. Do you know what happened to it after it was

(Testimony of Lester Johnson.)

taken to the stockpile? A. No, I don't.

Mr. Silvers: I have no further questions.

The Court: Do you want something, counsel? I see you standing there.

Mr. Vartan: No, your Honor.

The Court: If it's a matter of personal convenience, stand up. You have no questions to ask this witness, do you?

Mr. Vartan: No. [558]

Mr. Nave: No further questions.

The Court: Thank you very much.

(Witness excused.)

The Court: Next witness.

Mr. Nave: Mr. McMillan.

JAMES BOYCE McMILLAN

called as a witness by the respondents, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court.

A. James Boyce McMillan.

Direct Examination

By Mr. Nave:

Q. Mr. McMillan, how old are you, sir?

A. 54 years.

Q. And where do you reside now?

A. Lomita, California.

Q. Are you employed by the Union Oil Company?
A. Yes, sir.

Q. What is your present occupation?

(Testimony of James Boyce McMillan.)

A. Terminal supervisor.

Q. How long have you worked for the Union Oil Company?

A. Oh, about thirty years and six months, eight months.

Q. Now, at the time of the certain explosion and fire in September, 1954, in Avila, were you employed at Avila by the Union Oil Company? [559]

A. Yes, sir.

Q. And what was your then position?

A. Terminal supervisor.

Q. The term "terminal supervisor," Mr. McMillan, means that you were in charge of the Avila installation, is that right? A. Yes, sir.

Q. And how long had you been at Avila in that capacity before this explosion? A. June, 1942.

Q. Now, Mr. McMillan, do you recall the day there was an explosion and fire involving the fishing boat Santa Lucia in September, 1954? Do you recall that day? A. Yes.

Q. And did you hear any explosion or anything unusual that directed your attention to the fact that something had happened? A. Yes, sir.

Q. And where were you when something happened that directed your attention to that?

A. Sitting at the table in my kitchen, I think.

Q. How far away from the immediate area of the Santa Lucia at the fishing dock were you at the time you heard something?

A. About a mile, three-quarters of a mile.

Q. And what did you hear?

(Testimony of James Boyce McMillan.)

A. I heard just an explosion and booming.

Q. How many booms did you hear? [560]

A. Just one.

Q. And did you at that time or following that make any observation from any place?

A. Yes, sir. I ran to the front door which overlooked the harbor.

Q. And what did you see?

A. I saw a big cloud of smoke down there at the gasoline landing, and some low fire, but how much—it wasn't very much.

Q. All right. What did you do then?

A. I ran straight to my car, got in my car and drove to the head of our dock.

Q. All right. Just tell me what you did next.

A. Got the extra water equipment and lined up the crews, went to the head of the dock for extra fire equipment, saw that the master valves were all closed at the end of the dock. I talked to the sheriff and had him keep the traffic away. Before I left I talked to a highway patrolman and asked him to guard the private highway to keep people out.

Q. Did you go to the scene of the explosion and fire following that?

A. Yes, sir.

Q. And how did you go, walk or take a boat?

A. I ran to the approach.

Q. You mean by that you went out on the wharf itself?

A. On the narrow part of the dock called the approach. [561]

(Testimony of James Boyce McMillan.)

Q. Can you tell me, sir, approximately how long this wharf is from one end to the other?

A. Well, the approach is about twenty-seven hundred and some feet. The square is approximately 120 by 200.

Q. Now, you stated that—first, let me ask you, your home is in Avila?

The Court (Interposing): The approach is how long, did you say?

A. It is 2,700 and some feet, your Honor. Could be 2,600 and some feet.

The Court: That is the pier that projects out from the dock and that is out in the deep water?

A. Shallow water, your Honor. You have to go out far to get deep water.

The Court: You have a pier built out to the deep water dock? A. Yes.

Q. (By Mr. Nave): Is your home in Avila on a high place or down low?

A. Yes, sir, it's up high. It is on a hill overlooking the ocean.

Q. And can you see from your home the wharf installation or the Marine Service Station area?

A. Yes, sir, very clearly.

Q. Now, you stated that you first heard an explosion and [562] you went outside your home, is that right? A. Yes.

Q. And you saw a low fire?

A. Yes, sir, smoke and some low fire.

Q. Could you determine from that distance where the low fire was coming from?

(Testimony of James Boyce McMillan.)

A. No. It would have to be in the water, because my home is northeast and I was looking right down to our dock.

Q. Could you see what the color of the smoke was, what type of smoke you were seeing?

A. It was dark and light.

Q. Then when did you next make an observation in reference to seeing fire in the area after this first time you mentioned?

A. Well, going through town I got to the trestle and the dock was in good clear view again and I glanced over at that time.

Q. What did you see then?

A. I could see more fire and less smoke.

Q. Could you determine then where the fire was?

A. It was on the north side of the dock, the face of our dock.

Q. All right. Then did you from time to time after that make observations in the area of the fishing boat and dock?

A. At the time when I was at the head of the dock or the gate getting extra water and fire equipment, then I could look [563] out and see smoke and fire. I heard the ship bells, the general alarm.

Q. What ship? A. The Lompoc.

Q. Then did you, when you finally got to the immediate area where the service station dock is located, what did you observe then in reference to what was going on?

A. There was three or four men—it was a good hot fire by that time both on the water and the dock.

(Testimony of James Boyce McMillan.)

and there were several streams of water on the north side, and I could see over the smoke where they were pouring water on the south side.

Q. Now, did you remain at the scene of this explosion and fire for some time?

A. No, sir. Yes, at the scene of the fire I did, but not the dock.

Q. Did you get in a boat?

A. Yes, sir. The closest I got to the fire was approximately a hundred, 150 feet, and I observed a tug that saw me coming down and I climbed into the boat on a rope.

Q. Referring to the tug Avila, is that right?

A. Yes, sir.

Q. Now, were you in Avila at the time this particular Marine Service Station installation was installed?

A. Yes, sir.

Q. Are you familiar with the physical plant there in [564] reference to the location and size of the diesel gasoline tank and the various connections that service it?

A. Yes, sir.

Q. The size of the two tanks as shown on this sketch, Respondent's Exhibit N, GM diesel and "76" gasoline, what were the sizes of the tanks?

A. They were 2,600 gallons. They were small, tall steel tanks.

Q. And what was the size of the diesel oil tank?

A. Approximately a thousand gallons.

Q. Following this fire did you make an examination or inspection of the Marine Service Station installation there?

A. Yes, sir.

(Testimony of James Boyce McMillan.)

Q. And when was that inspection made?

A. Before we left the fire scene we looked over, or I did, to see there was no leakage or chance of a flare-up, and then before we brought the two big ships in—we had the Lompoc and Santa Paula coming by that time—I made a good, thorough inspection to see that there was no leakage before I brought those two tankers in.

Q. I understand the Lompoc was at sea, and you had other tankers coming in?

A. The Lompoc was at anchor and the Santa Paula came in and anchored in the Bay during the fire.

Q. How long after the explosion and fire was it that you [565] made an examination of the service station area?

A. Before we left the scene we actually looked all over good to see there was no leakage, but it was somewhere after midnight, possibly 11:30, I made an inspection before bringing the tankers in.

Q. All right. Now, what did you observe or see in connection with the three tanks as to evidence of any leakage or any rupture or any holes at all?

A. No, sir, there was no leakage at all, because we wouldn't have brought the ships in.

Q. Did you examine the pipelines, fittings and connections and valves that run from the various tanks to the edge of the dock?

A. I examined the valves on the tanks, and the other lines of the tanks at that time were shut off.

Q. Did you observe or see any leakage or spilling

(Testimony of James Boyce McMillan.)

from any of the valves, pipes or connections from the general GM diesel tank? A. No, sir.

Q. With reference to the "76" gasoline tank?

A. No.

Q. With reference to the diesel oil tank?

A. No, sir.

Q. Did you examine the warehouse as shown on the Marine Service Station? [566]

A. No, sir, you couldn't examine it too well. It was a wooden frame building. But I am sure there was no fire in it at the time.

Mr. Silvers: I am sorry. I can't hear the witness.

Mr. Nave: He was sure there wasn't any fire, he said, in the warehouse at that time.

Q. (By Mr. Nave): Was there any of the GM diesel or "76" gasoline or diesel oil salvaged in the tanks following the fire, to your knowledge?

A. Yes, sir, there was in our gasoline tank 700 feet something of salvage and put back in the sales department stock approximately two or three weeks later. And the diesel, there was salvage from the tanks. There was some evaporation, but all that was in the tank was salvaged and put back in stock. That's the GM diesel. The domestic diesel was salvaged. At the present time I can't figure what stock it went into. Possibly back up to the station.

The Court: Would it be convenient to take a recess now at this time?

Mr. Nave: Yes.

The Court: How long do you gentlemen want to recess to? Until two o'clock?

(Testimony of James Boyce McMillan.)

Mr. Vartan: Your Honor, in view of what has been expressed about the time limitations—I understand from Mr. Nave he has four days—I think that we had better start [567] working if we are going to finish.

The Court: Well, I am willing to work. If he has four days, we had better sit a little later tonight.

Mr. Vartan: I think it should be explored.

The Court: How many more witnesses do you have today?

Mr. Nave: I don't know, your Honor.

The Court: Gentlemen, tomorrow we will begin at nine o'clock in the morning and I expect to continue until five.

(Further colloquy off the record.)

(Thereupon, this cause was recessed to the hour of 2:00 o'clock p.m.) [568]

September 9, 1957—2:00 P.M.

JAMES BOYCE McMILLAN

recalled as a witness on behalf of the respondents, resumed the stand, having been previously duly sworn, testified as follows:

Direct Examination

(Resumed)

By Mr. Nave:

Q. Mr. McMillan, following this explosion and fire, certain material was removed from the service station dock at a later time?

(Testimony of James Boyce McMillan.)

A. Yes, sir, it was all removed to rebuild the platform there.

Q. And there was some metal that was in the residue of the fire removed from there?

A. Yes, sir.

Q. Was the meter one of the articles?

A. Yes, sir.

Q. And what was the condition of the meter following the fire?

A. The frame of the meter was in good shape, but the top part was burned out.

Q. And do you know what happened to the scrap or the metal that was removed from the dock following the fire?

A. Anything that was removed from the dock was put in a—they had a general junkpile, and after a certain length of time, [569] why, some vendor comes around and bids on it, and they just take the 20 or 30 tons of junk, whatever there is.

Q. They disposed of the meter, you mean?

A. Yes.

The Court: How big was this meter?

A. The meters are——

The Court: This meter.

A. This meter was about 22 inches, 24 inches long, about so wide, 18 inches wide possibly.

The Court: 24 inches by 18 inches?

A. Yes, something like that.

The Court: And what was shown on the meter?

A. We had several types of meters. The type we used at that time, your Honor, was like a speed-

(Testimony of James Boyce McMillan.)

ométer type that had small figures for your total amount and a clock that you can set the amount of delivery.

The Court: Just what do you mean by that, that you had a clock which you could set?

A. You could zero your sale after your sale.

The Court: You mean bring it back to zero?

A. Yes.

The Court: And did it have any apparatus that would shut off delivery when you reached a certain quantity?

A. No, sir.

The Court: It had no shutoff? [570]

A. No.

The Court: There was no mechanism in this meter that, for instance, if you set the delivery at ten gallons, the valve would shut and delivery would stop at ten gallons?

A. No, sir.

The Court: How big were these numbers on delivery, that would show the quantity of gasoline delivered?

A. It would be hard to quote, your Honor.

The Court: Well, about.

A. Possibly a little over a quarter of an inch.

The Court: The numbers were a quarter of an inch?

A. About that.

The Court: That would show the total gallons delivered?

A. Yes, sir.

The Court: A quarter of an inch high?

A. Yes, or higher.

(Testimony of James Boyce McMillan.)

The Court: And how would these numbers be shown on this indicator? Were they white numbers on a background or black numbers on a white background or were they just metal numbers without any paint?

A. No, sir, there were several meters that had black numbers.

The Court: No, I am talking about this particular meter, on the gasoline meter that was on that dock the day of [571] this explosion.

A. I couldn't give you which was which.

The Court: Do you remember whether it had any color or whether it was just a metal without a color?

A. No, it had colors.

The Court: It did have colors. You don't remember?

A. No, I don't remember.

The Court: Now, were these numbers on this meter exposed on both sides of the meter or only on one side?

A. One side .

The Court: And where was that side, to the dock, to shore or to the water?

A. It was facing the water, but you could see it from the office; by looking out the office window you could see it.

The Court: Now, facing the water, the numbers were facing the water?

A. They were facing the water, yes, sir.

The Court: Were they facing the side at which this ship had been docked?

(Testimony of James Boyce McMillan.)

A. Yes, sir.

The Court: And how high above the dock was this meter, how high, how high above the floor of the dock were the numbers on this meter?

A. Two feet or a little less; two feet to twenty-six inches.

The Court: And how near the edge of the dock was [572] this meter? How far was it set back from the edge of the dock?

A. Approximately five feet.

The Court: Five feet?

A. Approximately, sir.

The Court: So, then, one aboard the ship, with the deck of the ship nine feet below the floor of the deck, could not see these numbers unless he climbed up on something?

A. No, sir.

The Court: All right, sir.

Mr. Nave: Thank you.

Q. (By Mr. Nave): Mr. McMillan, did you notice the prevailing wind, the direction of the wind which was blowing at or about the time of this explosion and fire?

A. No, sir. We had an easterly wind all afternoon, and then it was twenty minutes after the fire after I left the dock, at four o'clock, after that, but when I returned to the fire we still had a southeasterly wind.

Q. Had what, sir?

The Court: "Still had a southeasterly wind."

A. Yes.

(Testimony of James Boyce McMillan.)

Q. (By Mr. Nave): South?

A. Southeasterly, light, wind.

Q. Did you estimate the rate of speed, the number of miles per hour it was blowing?

A. Well, it was three to five miles. [573]

Q. There is an arrow indicated on Respondent's Exhibit B. Is that generally the direction the wind was blowing?

A. Yes, that's southeast.

Q. Is that about right?

A. Yes.

Q. That's the direction?

A. Yes.

Q. Now, on the service station dock, the Marine Service Station Terminal, what type of electrical equipment, lights and conduits, were installed there?

A. We had explosion-proof electrical fittings.

Q. You say explosion-proof. What do you mean by that? Describe it.

A. The dock was new and it was all—it had all new fittings. They were heavy fittings and the conduits were packed with a powder of some kind, explosion-proof fittings or heavy electrical fittings.

Q. Now, Mr. McMillan, you were the superintendent in charge of this Marine Service Terminal at the time of this explosion, were you not?

A. Yes, sir.

Q. And you had been there in charge of that terminal for, I believe you stated, around fifteen years before this explosion?

A. Yes, sir. Not at that time. That was four years ago, and I would say eleven years, over eleven years at the time of [574] the explosion.

Q. And during that period of time you yourself

(Testimony of James Boyce McMillan.)

serviced or assisted in any fueling of or the handling of gasoline and diesel for any ships and vessels that came into the Marine Service Station?

A. I helped the boys, yes, sir.

Q. And were you acquainted with the custom and practice as to the dispensing of gasoline from the Service Station Terminal?

A. Our custom had always been there: If a man would come in and say so much money he wanted to be shut off, or if he gave a specific amount to be shut off, our boys would shut him off. Otherwise, why, the man at the nozzle had control of it and they left it to him. That had been our custom for years.

Q. And were those the instructions that Mr. Caldwell had? A. Yes, sir.

Q. In handling the gasoline at the Marine Service Station? A. Yes, sir.

Mr. Nave: You may cross-examine.

Cross-Examination

By Mr. Silvers:

Q. You say both the custom and the instructions of the Union Oil Company to its employees were in the event someone asked for a definite amount of gasoline at the gas dock, to see that he got that amount and shut him off, is that right?

A. A specific amount, yes, sir. [575]

Q. A specific amount? A. Yes, sir.

Q. Say thirty gallons, right?

A. If he said specifically he wanted thirty gallons, we shut him off at thirty gallons.

(Testimony of James Boyce McMillan.)

Q. Was that both the custom and practice, as well as the express instructions of the company, to the employees at the dock? Is that correct, sir?

A. Yes, sir.

Q. Pardon me? A. Yes, sir.

Q. Hadn't you had trouble with that meter before at the gas dock that you knew about, Mr. McMillan? A. Yes, sir.

Q. None at all? A. Not the meter, no.

Q. Were you in court when Charles Caldwell testified concerning the trouble they had with the meter?

A. We had trouble with this meter. It would stop registering. That was the only thing that happened to it. That happens with meters if it gets a piece of scale or something gets in there, and it stops them, but that's the only trouble we ever had with the meter, with that particular meter.

Q. That's the only type of trouble that you knew about?

A. That's the only type of trouble we had with any of the [576] meters.

Q. You told us that the top part of the meter was burned. It was actually fused together, wasn't it, the metal? A. Yes, sir, after the fire.

Q. And was the metal coupling to which the gas hose was joined, where it began was that also in this group of metal that was sold for junk after the fire and explosion?

A. We discontinued the service station. All that stuff went for junk.

(Testimony of James Boyce McMillan.)

Q. I am referring to the same item that I pointed out to Mr. Johnson. I am showing you again the photograph, Respondent's D, the coupling to which the gas hose joined. Was that also part of the metal that was sold with the meter?

A. Possibly thrown away or sold because it was of no further use.

Q. You said, sir, you had conducted a test after the fire and explosion of the various pipes and fittings that remained?

A. Yes, sir.

Q. Isn't that correct?

A. Yes, sir.

Q. You found everything tight and orderly, there were no ruptures or lesions, is that right?

A. Yes.

Q. Mr. McMillan, did you ever make or did anyone to your knowledge at Union Oil ever make a test of that portion of the [577] pipe that led from the meter to the gas hose on the reel?

A. No, sir, it was all steel. It was all together.

Q. I beg your pardon?

A. It was all steel fittings and they were all together.

Q. Well, you mentioned that they had been tested. How did you test the other sections of the pipe and fittings that you were referring to?

A. The following morning we saw that the gate was closed back at the meter and—the steel gate—and we opened the tank onto the pipelines and watched for leaks.

Q. You let fuel run through the pipelines, is that right?

A. Yes, sir.

(Testimony of James Boyce McMillan.)

Q. And you saw there were no leaks?

A. We didn't run it through; we filled the pipelines with fuel from the tanks.

Q. You filled them with fuel from the tanks?

A. Yes, sir.

Q. You observed no leaks, but you filled them with fuel from the tanks just up to the point of the meter, didn't you? A. Yes, sir.

Q. You didn't make any test at all from the meter to the end of the—to the gas hose reel, did you? A. No, sir.

Q. So you have no means of knowing what the condition of that section of the pipe was, isn't that right, sir? [578]

A. The pipe was in good—the pipe was in good shape.

Q. The pipe was in good shape. You mean just to a visual inspection, is that right, Mr. McMillan?

A. Yes, sir.

Q. The stock of white gasoline and appliance fuel that were in the warehouse were completely consumed in this fire and explosion, were they not?

A. I couldn't say whether they were completely or not, but they were mostly consumed, yes, sir.

Q. They were stored in the warehouse shack on the side of which the portable fire extinguisher is placed, isn't that correct?

A. Yes, sir. Would you repeat that question again? I didn't get it.

Q. The stocks of white gas and appliance fuel were stored in the warehouse shack on the gas dock,

(Testimony of James Boyce McMillan.)

on the side of which shack the portable fire extinguisher was placed, isn't that correct?

A. We didn't have a shack; we had a warehouse, sir.

Q. Well, you will pardon my terminology. I am referring to the structure, whatever it was called.

A. Yes, sir.

Q. It is noted as a warehouse on your diagram, and in which was stored the white gas and appliance fuels. You know what I am referring to? [579]

A. Yes, sir. There was a fire extinguisher on the side of that, yes, sir.

Q. By the way, was that fire extinguisher recovered?

A. No, sir, it dropped into the water or it wasn't——

Q. It wasn't anywhere on the dock?

A. No, sir. The planking was burned out, right at the meter, or that part of it.

Mr. Silvers: I have no further questions.

Mr. Vartan: I have no questions.

The Court: All right, sir. Thank you.

(Witness excused.)

JAMES EWING HILL

called as a witness on behalf of the respondents, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name to the Court, sir.

A. James Ewing Hill.

Direct Examination

By Mr. Nave:

Q. Mr. Hill, how old are you, sir? A. 60.

Q. And you are an employee of the Union Oil Company? A. Yes, sir.

Q. And what is your designation or your title for your job?

A. Supervisor of Fire and Protection for the Union Oil [580] Company; my function is chief fire protection engineer, chief safety engineer.

Q. And how long have you been a supervisor of fire safety? A. Since approximately 1940.

Q. How long have you worked for the Union Oil Company? A. Thirty-six years.

Q. What is your educational background, Mr. Hill?

A. Graduated in chemistry, Cal Tech, Pasadena.

Q. Do you belong to any professional societies in the field of chemical engineering?

A. Not in chemical engineering.

Q. What is your field in that respect?

A. Well, my present field is fire protection and safety engineering.

Q. Do you belong to any professional societies in

(Testimony of James Ewing Hill.)

reference to that? A. Yes, sir.

Q. What?

A. Charter member of the Society of Fire Protection Engineers, also charter member of the American Society of Safety Engineers and American Petroleum Institute, and chairman of the Fire Protection Engineering Committee, past chairman of the Central Committee of Fire Protection, and presently a member, and past chairman of the Western Gas Fire Committee and presently a member, member of the Inflammable Liquid Committee of the [581] National Fire Protection Association, and also the NFPA Committee on Piers and Wharves.

Q. In connection with your work and your experience, Mr. Hill, is it your job to investigate fires and explosions?

A. Major fires and explosions.

Q. Major fires and explosions. And is that experience confined to explosions or major fires that appertain to the Union Oil Company or is that in the industry?

A. I have investigated many fires other than those that occurred for the Union Oil Company.

Q. Did you investigate the explosion and fire that occurred at Avila, California, in September, 1954?

A. Yes, sir.

Q. And when did you arrive at the scene of the explosion and fire?

A. As I recall, about nine o'clock the following morning.

Q. And did you go to the Marine Service Station

(Testimony of James Ewing Hill.)

installation and make an inspection of the equipment that was then on the service station dock?

A. Yes, sir.

Q. Will you tell the Court just what your inspection consisted of? What did you do?

A. Typical engineering inspection. I was interested in the operating facilities, that is, the tanks, the piping, warehouse, and the condition of the wharf itself. [582]

Q. Did you make an inspection of the three tanks and their fittings, that are detailed on Respondent's Exhibit N?

A. Yes, sir.

Q. Will you tell the Court just what you of your own knowledge determined as to condition of each and every bit of equipment involved in the gasoline and diesel tanks and their connections.

A. Well, considering the "76" gasoline tanks and connected piping first, the tank still contained approximately 1100 gallons of product. There was no evidence of any leakage in the shell or the bottom of the tank. The paint was considerably scorched, particularly on the east and south fronts. The tank did not suffer sufficient fire exposure to consider condemning it, and there was no evidence whatsoever of any rupture or release of product from the tank.

Next considering——

Q. Go ahead.

A. Next considering the piping from the tank, the installation was put in in 1951. It is typical of our installations of that period. All of the piping and

(Testimony of James Ewing Hill.)

fittings, such as valves, tees, elbows and so forth, were steel, and the fire exposure over approximately an hour and a half time in the area in which it was most severe was typical as to what could be expected.

The static pressure on that pipeline under normal use [583] is roughly eight to ten feet of oil, which is equivalent to say, two or three pounds PSI, which is very, very low pressure for 150-pound steel equipment. And there was no evidence of distortion or thread leaks or any loss of product up to the first plug cock that was due west of the strainer which in turn was due west of the meter.

I also looked at the piping on the downstreet side of the meter, and although it had taken more severe punishment than the other, from the standpoint of just general appearance, there was no evidence of any leakage at that point.

The meter—the upper portion of the meter, which was constructed of a lower melting point alloy than ordinary steel, had been fused and that appeared to be the point at which considerable gasoline had been released after the fire was under way.

The hose had been burnt off at the coupling. There was long fire exposure at that point. And the coupling was still in place at the reel.

As I said, throughout that entire piping system the maximum pressure that is obtainable is the static head of the liquid which is under 3 PSI (pounds per square inch).

Q. Is how much static head?

A. Not over three pounds at the most.

(Testimony of James Ewing Hill.)

Q. Now, with reference to the tank and the connections marked "GM Diesel," Mr. Hill, will you tell the Court what [584] inspection you made of that tank and the appurtenances, pipeline connections, as the result of your investigation?

A. There was still diesel in the GM tank; that tank had suffered more punishment than the gasoline tank as more paint was burnt off the surface, further around the periphery of the tank. The piping from that tank is also 150 pounds steel piping, and I didn't see any evidence of any leakage at that point.

Q. Did the GM tank, Mr. Hill, show any evidence of fracture or disruption or breaking?

A. None whatever. There was no evidence of any leakage of product from that tank.

Q. Now, the remaining tank is marked on the same exhibit and both exhibits are on the board, particularly we refer to Respondent's Exhibit N marked "Diesel Oil." Did you make an examination of that tank and its pipe connections, fittings, couplings, valves?

A. I did.

Q. Will you state what you found to be the condition of the tank and all of its appurtenances?

A. That tank had taken more fire exposure than the others. There was a fitting on the east side of the tank that appeared to have been hit by a missile, a small fitting, about a quarter-inch connection. That was broken mechanically. It was evident that the oil in that tank, after having suffered approximately an hour or more fire exposure from the heavy

(Testimony of James Ewing Hill.)

timbers burning underneath it, that the diesel was brought up to its boiling point and apparently had sprayed out product from the relief valve and also released product from the small line on the east side of the tank.

The piping from that tank also showed no evidence of any rupture or any leakage.

Q. Did the tank itself show any evidence of ruptures, holes, leakage or exposure?

A. The shell and the head and the fittings on the tank looked satisfactory.

Q. You mentioned that something—I didn't quite catch, Mr. Hill—showed evidence of something like being hit by a missile. What are you referring to in that respect?

A. There was a small fitting — I don't recall what it was—it was on the east head of the tank—which was broken and appeared to have been struck by some heavy missile such as a timber.

Q. Did you in that same area, Mr. Hill, that you have covered in this inspection, did you make any inspection of the timber, the planking and the pilings of the wharf structure itself at the time of your inspection?

A. Yes, sir.

Q. And will you state to the Court what your inspection revealed in that respect? [586]

A. Well, consider the decking first, it was evident that in the area where the meter was located and where gasoline had been released from the "76" tank that the severity of burning was the greatest.

(Testimony of James Ewing Hill.)

With the open planking we had there on the dock, cracks between the planks, it permitted the air to come up through the planks at the time it was burning on top and naturally the deck acted the same as a grate and would exhibit pretty heavy burning. The fire spread over into the warehouse area and also had burned the planking in the warehouse. The corrugated iron, of course, was partially down, and as the fire spread into the warehouse the drums of the warehouse exhibited typical fire exposure damage that I have seen in other locations. The charring on the piling was what might be expected from the diesel oil burning on the water below it. It was quite evident to me that when the diesel tanks from the vessel went below the surface and apparently were ruptured by the force of the explosion, that as the water——

Mr. Silvers: I don't like to interrupt the witness, but I am going to object to the continued speculations as to the origin of things that were not observed. The witness has been asked to describe his observations.

The Court: The objection is sustained. The witness hasn't said that he ever examined these things until after the explosion. He never inspected the wreck.

Q. (By Mr. Nave): Mr. Hill, there was an objection to [587] that end of your testimony. We will go into that later. Will you continue as to what your inspection revealed as to the pilings and the timbers and the framework of the Marine installation?

(Testimony of James Ewing Hill.)

A. Yes, I understand.

The substructure of the wharf in the area of the meter showed the most severe burning. There was evidence of the piers—or the piling, rather, under the wharf around the north side, of oil having burned over the water in that area and there was considerable charring in that area. Where the fire-hoses had had best effect on the piling, there was less charring because you had a cooling of the surface and evidently less burning in that area. It was typical of——

Mr. Silvers: Just a minute. I am going to move to strike that, Your Honor, this reference to where the firehoses had the best effect on the piling.

The Court: Yes.

Mr. Silvers: I think it is most objectionable.

The Court: Strike it.

Mr. Nave: This man is an expert.

Mr. Silvers: He wasn't there when the firehoses were being used.

The Court: The witness may testify as to his expert knowledge and experience. If you wet a piece of wood, it doesn't burn as quickly as a piece of wood that is not wet. [588] We may accept that as a matter of common knowledge.

Q. (By Mr. Nave): Mr. Hill, did you make any particular inspection at the time of your examination as to the condition of certain pilings on the underside of the dock at the water line as to whether or not they were upright or straight or crooked or that sort of thing?

(Testimony of James Ewing Hill.)

A. Some of the piling on the east face of the dock, most closely adjacent to the fore part of the ship Santa Lucia, were displaced to the west and clearly indicated to me——

Mr. Vartan: Just a minute.

Mr. Nave: That's all right.

Q. From your experience, Mr. Hill, as an engineer and fire protection and safety man do you have an opinion as to the cause of the pilings in the water line being broken loose and as indicated in the photograph Respondent's Exhibit B, being in the condition indicated thereon? A. I have.

Q. What is your opinion, sir?

A. Well, it was evident that great force was required to break and displace the pilings, and that that force was from the east side on the basis of the displacement and was in the direction of the engine room of the Santa Lucia.

Q. Mr. Hill, assuming first—let me ask you this question, the gasoline that would be dispensed or would flow through the hose nozzle and connection, similar to the one I have in my [589] hand marked Respondent's Exhibit J, and assuming that this hose, similar hose, was on a hose reel at the position marked on Libelant's Exhibit 2, near the edge of the dock and connected to the "76" gasoline tank, and assuming that this type of hose and a similar type of nozzle had been inserted into the fueling fill pipe of the fishing vessel Santa Lucia some nine feet below the edge of the wharf, can you tell me what the amount of pressure would be exerted by the fuel

(Testimony of James Ewing Hill.)

leaving the nozzle and going into an open tank in that location?

Mr. Silvers: Object to the form of the question, Your Honor, on the ground that it does not include all of the facts.

The Court: Well, it doesn't include all of the facts, but we will take it for what it is worth.

A. The static head of the gasoline to the upstream side of the nozzle would be approximately six to seven pounds per square inch. It would be substantially lower than that where it would be discharged from the outlet of the nozzle and as soon as it reached the opening, of course, there would be very little pressure exerting other than just the impact pressure at the rate at which it was flowing.

Q. (By Mr. Nave): You are familiar, are you not, with the construction—Mr. Hill, with the construction and the type of hose connections that are used in the gasoline industry on the Pacific Coast in marine service stations? [590]

A. Yes, sir.

Q. I will ask you if the type of hose that is on the nozzle in this exhibit, Respondent's Exhibit J, is or is not a typical gasoline hose used in marine service stations on the West Coast.

Mr. Silvers: Objected to on the grounds it is incompetent, irrelevant and immaterial whether it is typical.

The Court: Overruled.

A. The hose is typical of what is used in the marine service stations.

Q. (By Mr. Nave): You will notice in the hose

(Testimony of James Ewing Hill.)

itself, Exhibit J Respondent's, there are some wires that are shown. Will you tell the Court the purpose of those wires, what their function is, and why they are there?

A. The prime purpose of the wires is to serve as a reinforcing for the hose. They serve a so-called secondary purpose, of bonding it—electrostatically bonding the nozzle back to the piping system on the dock. Such wire is brazed to the couplings that are on each end of the hose.

Q. Are you acquainted, Mr. Hill, with the custom and practice on the Pacific Coast in reference to the fueling of wooden vessels by gasoline, as to whether or not a separate bonding clamp is used running from the gasoline hose down to a clamp that would be attached to a wooden vessel?

A. Separate bonding wires are not used in the industry for [591] this type of service.

Q. I will ask you if the bonding device as shown in the exhibit which you have just discussed, being Respondent's Exhibit J, is the usual type of bonding wire that is used in the petroleum industry in marine service installations.

A. That is correct.

Q. Now, the metal that is used in the nozzle itself in this type of nozzle is what? What is that metal?

A. It appears to be, to me, either bronze or brass—at least it is a copper-bearing material.

Q. I will ask you if that type of metal construction and that type of metal itself is customarily used in marine circles in handling gasoline in the industry?

A. That is correct.

(Testimony of James Ewing Hill.)

Q. Mr. Hill, assume that you had a gasoline tank aboard the fishing vessel Santa Lucia and assuming that the gasoline tank was from 30 to 40 gallons in capacity and that the gasoline tank itself was below the deck with a fill pipe coming out at the top of the deck and being sealed in that position with only the outlet being at the deck level, and that to open that would mean the removal of a hand cap, and assuming that a nozzle, similar to the one that is in evidence here, Respondent's Exhibit J, is used, and assuming that the nozzle itself is smaller than the opening of the fill pipe itself, what would happen in the normal seaworthy tank to any amount of gasoline [592] in excess of its capacity that were released into that tank?

Mr. Silvers: Just a moment—pardon me. Did you finish, counsel?

Mr. Nave: Yes.

Mr. Silvers: Object to the question, your Honor, on the ground it assumes facts not in evidence, it is remote and speculative. This witness has not been qualified to answer in the particulars the question refers to, and there is no evidence at all about what type of tank is referred to by counsel's reference to a normal seaworthy tank. For all those grounds we object to the question.

The Court: Overruled.

Mr. Nave: You may answer the question, Mr. Hill.

A. If the tank contained, for example, thirty gallons—I mean, if it had that capacity——

(Testimony of James Ewing Hill.)

Q. Say 30 to 40 gallons.

A. 30 to 40-gallon capacity, and more fuel was dispensed to the tank than its capacity, it would obviously come up through the fill pipe and spill out on deck.

The Court: Incidentally, I want to point out to counsel, I have no evidence as to how much this tank held.

Mr. Nave: Beg your pardon?

The Court: I don't recall any specific evidence as to the construction of this tank, as to what it was made of.

Mr. Nave: Yes, from Captain Hansen's [593] survey.

The Court: I haven't got that yet. All that we have is that it was a tank. I think one of the witnesses said it contained about thirty gallons. But no witness knows anything about the piping or has said anything that had anything to do with anything below deck. All the men from the vessel said they worked on deck, above deck. However, I assume some evidence that I am going to get later on, that will be helpful.

Mr. Nave: I can put Mr. Hill back on after Captain Hansen's survey.

The Court: No, go ahead. You ask Mr. Hill the questions now. I am assuming that you are going to bring in this evidence. You go ahead on that assumption.

Mr. Nave: Thank you.

(Testimony of James Ewing Hill.)

Q. Assuming, Mr. Hill, that the gasoline tank is a metal construction and that it contains some 30 to 40 gallons or would hold 30 to 40 gallons, and assuming that the filling operation was conducted by the use of a hose similar to the one in this exhibit, Respondent's J, and with a nozzle similar to the one on the same exhibit, I will ask you whether or not such a tank, if properly constructed, would rupture if more than the capacity of the tank were released into the fill pipe by this type of hose and nozzle.

Mr. Silvers: I would like to renew my objections to the previous hypothetical questions on the same grounds.

The Court: Overruled. [594]

A. Well, the tank should not rupture, and the material should spill out through the fill pipe.

Mr. Nave: You may examine.

Cross-Examination

By Mr. Silvers:

Q. Mr. Hill, you didn't observe any significant evidence of charring on the water side of the pilings when you made your inspection, isn't that correct?

A. I did observe significant evidence of charring on the water side of the piling.

Q. Is it not a fact that most of the charring of the pilings that you observed was on the face of the piling away from the Santa Lucia's berth and under the gas dock?

(Testimony of James Ewing Hill.)

A. It appeared to me to be fairly well distributed around the face of the pilings except for the area in which the pilings were better protected by firehose streams, and that could be expected when you had a fire roughly an hour and a half duration.

Q. Mr. Hill, does Respondent's Exhibit C which I am holding correctly show the condition of the pilings that face the Santa Lucia as they were after the fire and explosion took place?

A. This photograph that you show me here is not part of the dock that faced the Santa Lucia.

Q. Are you sure of that, sir?

A. Is this not the southeast corner of the dock that faced the stern end of the Santa Lucia? [595]

Q. Well, I would like to ask you, what portion of the gas dock does that photograph show, starting from the point to the left of the center and running toward the right edge of the photograph, to help you?

A. That shows——

Q. Before you answer that, may I point out the location of what appears to be the gas hose reel immediately above the section I have called your attention to. Would that refresh your recollection?

A. Yes.

Q. Well, now, what is your answer?

A. I don't think that the photograph adequately illustrates the condition of the piling. It does illustrate the very heavy charring, but it does not illustrate areas in which there was charring—but not as heavy as illustrated on the photograph.

(Testimony of James Ewing Hill.)

Q. These photographs were taken under Union Oil direction, were they not?

A. I was not present or I did not see the photographs taken. I did not direct the photographs to be taken.

Q. Well, you know that some one else at Union Oil did, though, don't you, Mr. Hill?

A. I don't think Union Oil took the pictures.

Mr. Nave: Let it be understood they were taken by an independent photographer. I am sure you know the company did not take the photographs.

Mr. Silvers: I will pass the question.

Q. Your position, as I understand it, whatever the condition of these pilings that faced the Santa Lucia were immediately after the explosion, that this was principally the result of the effect of the use of the firehoses? A. No.

Q. Is that your position?

A. No. Not entirely.

Q. I understood you to say that the pilings were less charred in the area where the firehoses had their maximum effect?

A. The firehoses were not the only controlling factor.

Q. The firehoses were one of the controlling factors so far as the spread and intensity of the fire were concerned, were they not?

A. I think the wind was a factor also, because the wind was from the southeast, and you are showing me or you have shown me a picture of the southeast corner of the dock, and the most severe burning

(Testimony of James Ewing Hill.)

was under the north half of the dock and not that portion.

If you had an illustration of the north half of the dock that corresponds to that, it would be better.

Q. Mr. Hill, is it your position that the firehoses that were played upon the pilings of the dock did not have any significant effect?

A. I did not say that. [597]

Q. They did, didn't they? A. They did.

Q. And do you know when the fire hoses were first applied to the Santa Lucia side of these pilings before the fire and explosion took place—how long after the fire and explosion began did the first fire hoses play on that face of the pilings? Do you know that, Mr. Hill?

A. I think the fire hoses played first on the south and possibly the north face of the dock.

Q. My question, Mr. Hill, is: Do you know, and if you don't you may say so, do you know how long after the fire and explosion began the fire hoses played on the face of the pilings of the gas dock that faced the Santa Lucia?

A. I don't know the exact time.

Q. Do you know approximately? Was it five or ten minutes afterwards?

A. The first fire hoses that probably had been directed directly on the east face would have to have been directed from the Avila, but, as I said before, the relative burning around the face of the pier was not simply a function of water protection from the fire hose.

(Testimony of James Ewing Hill.)

Mr. Silvers: We will ask that all that go out as non-responsive.

The Court: No; I understand. Motion denied.

Q. (By Mr. Silvers): You know as a fact, don't you, [598] Mr. Hill, that the tug Avila did not get under way immediately? A. That's correct.

Q. After the fire and explosion took place, you know that, don't you? A. That's correct.

Q. You know that a period of at least five minutes went by before the tug got under way, don't you? A. That's correct.

Q. You know that the tug picked up Mr. McMillan, who had come from his home on the shore before it began, to play water on the pilings?

A. I am not sure of that time factor.

The Court: He wasn't there, counsel. He only knows what people told him.

Is that correct?

A. That's correct.

Q. (By Mr. Silvers): Isn't it a fact, Mr. Hill, that there was no operational tests made of the integrity of the pipeline that ran from the meter to the gasoline hose following this fire and explosion?

A. What do you mean by "operational test"?

Q. I mean, by passing the liquid or fuel through the pipe as distinguished from simply a visual examination.

A. There was no pressure test made of that pipe.

Q. Was there anything except a visual examina-

(Testimony of James Ewing Hill.)

tion made of [599] that portion of the pipe, the portion that ran from the meter to the gas hose?

A. No; and I think that my past experience in inspecting piping after fires led me to sound conclusions as to the condition of the pipe.

Mr. Silvers: We will ask that go out.

The Court: The answer is stricken as not responsive. Stricken.

Mr. Silvers: No further questions.

Mr. Vartan: No questions.

The Court: We will take a ten-minute recess.

(Recess.)

Mr. Nave: Will you resume the stand, Mr. Hill?

Redirect Examination

By Mr. Nave:

Q. Mr. Hill, there is one question I didn't ask you on direct—and I ask leave of the Court to inquire at this time—that is in reference to Mr. Caldwell's physical examination. Did you see Mr. Caldwell on the day of your first arrival at the scene of the explosion and fire? A. Yes, sir.

Q. What did you observe in reference to his injuries, as to his person or as to his clothing at that time?

A. Well, his face and his forehead, his brows and the front part of his hair, indicated a light flash burn with first [600] degree or superficial flash burns.

Q. Thank you.

(Testimony of James Ewing Hill.)

A. No evidence of burning of his hands.

Mr. Nave: That's the only thing I want to ask.

Recross-Examination

By Mr. Silvers:

Q. I wasn't sure I heard you, Mr. Hill. You say you were first at the scene of the fire and explosion on the day following the fire and explosion?

A. That's correct.

Mr. Silvers: Thank you.

(Witness excused.)

Mr. Nave: Mr. Johnson, will you please take the stand again for a question or two?

LESTER JOHNSON

recalled as a witness on behalf of the respondents, having been previously duly sworn, testified further as follows:

Redirect Examination

By Mr. Nave:

Q. Mr. Johnson, you were on the stand this morning and testified? A. Yes, sir.

Q. Mr. Johnson, you testified this morning that you had been assistant foreman of the Avalon installation for a number of years prior to this explosion and fire? [601] A. That's right.

Q. And during that period of time that you had been there had you had experience, yourself, in fueling of gasoline and Diesel on vessels and ships at

(Testimony of Lester Johnson.)

this Marine Service installation? A. I have.

Q. And are you acquainted with the custom and practice and the instructions from the Union Oil Company in reference to the dispensing of gasoline when certain quantities are asked for?

A. Yes.

Q. Now, I will ask you, assuming that someone requesting gasoline would say in response to an inquiry that it would take approximately a given amount, such as thirty gallons, what is your custom and practice in respect to cutting them off or having men cut themselves off?

A. Well, it's common practice if a man asked for approximately—for an approximate amount of gasoline, would be to let him have the hose and take what he wanted. He would have control of that.

If a man asked for a certain amount, just said he wanted ten gallons, we would shut him off at ten gallons.

If he said he wanted a certain amount in money, we would look up and see how many gallons would be in the two dollars' worth or five dollars' worth and give him that amount.

The Court: Is it part of the rules of your company that as gas is flowing through the feed pipe that the attendant [602] should watch to see how much gas has been delivered?

A. The practice of the company is to watch it, yes, but also——

The Court: That is the answer. You said yes. Go ahead and finish it now.

(Testimony of Lester Johnson.)

A. The boats coming in to fuel, ordinarily you pass them their gas hose or their Diesel hose and they then, most of the time, take water, so you walk away from your meter, you never watch, you never keep your eyes right on it unless you are going to shut down, and you go and give them the water hose and maybe they want five gallons of oil, and if they did, they pass up their can and you go into the warehouse and fill up their can full of oil, bring it back and pass it down to them. They have control of the gasoline.

I have served gasoline when the man is—his tank is full and he has let the spring go or he has closed his nozzle, and you would still be drawing oil, so when you came out he was finished taking the gasoline, but you wouldn't be right at the meter.

Q. (By Mr. Nave): Thank you——

A. You would take the meter reading as he had finished.

Mr. Nave: Thank you, Mr. Johnson.

Mr. Silvers: No questions.

Mr. Vartan: No questions.

(Witness excused.) [603]

Mr. Nave: Now, your Honor, that's all the witnesses that we have here this afternoon. As we indicated in chambers, our procedure tomorrow would be to have the doctor.

(Thereupon an adjournment was taken to 10:00 o'clock a.m., Tuesday, September 10th, 1957.) [604]

September 10, 1957—10:00 A.M.

Mr. Silvers: Your Honor, at this time we wish to make a statement with respect to the petition for limitation in Action No. 27211 in Admiralty, now pending in this court. Counsel for the claimants in that matter have agreed, and are willing to stipulate, which is acceptable to us, that matter may be heard and determined by your Honor, and I have been informed by Mr. Whelan that answers to our petition in that action have been filed as of this morning, and we would like to enter the stipulation on the record at this time that the matter may be heard and determined by your Honor.

Mr. Whelan: And these answers, your Honor, are for four cases, the cases of Joseph Salmeri, the case of Frank Pedrasaz, the case of Antoine Belleci and the case of Antoine Belleci as Administrator of the Estate of Jacques Cardinale.

The Court: Did you also file claims for Nino Tarantino or——

Mr. Vartan: That case, consent decree has been entered, your Honor.

The Court: At the beginning of the trial of these suits which we are now hearing, the petition for limitation was called to my attention and at that time I suggested to counsel for all sides that that petition be tried simultaneously with the trials now being conducted and that the evidence [605] received at those trials be deemed applicable for determination of the merits of the petition for limitation.

Accordingly, counsel have consented to file an

answer and have consented that the petition for limitation be tried simultaneously with the other libels.

Mr. Vartan: That is correct.

The Court: And that is what I have done. So, at the time I pass upon the merits of these suits we are now trying, I will also pass upon the merits of the petition for limitation, and, I take it, that there will be no other evidence offered by either petitioner or the claimants on that petition for limitation, other than what has been received by the Court in connection with the trial of the suits now pending.

Mr. Silvers: That is correct, your Honor.

The Court: All right. You proceed.

Mr. Nave: Call Doctor Civello.

ARTHUR A. CIVELLO

called as a witness by and on behalf of Respondent Union Oil Company, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court, sir.

The Witness: Arthur A. Civello.

Direct Examination

By Mr. Nave:

Q. Doctor Civello, will you please state your medical [606] training, where you studied medicine, the colleges and schools, your background medically?

A. Yes, sir. I graduated from the University of California Medical School in 1944. I had one year

(Testimony of Arthur A. Civello.)

of interneship, three years of orthopedic specialty training at the University of California Hospital, two years as Chief of the Orthopedic Department of the 279th Station Hospital in Berlin, Germany. And I started practicing orthopedic surgery in 1950.

I am a member of the American Academy of Orthopedic Surgeons, having passed their Specialty Board examination in 1953 and admitted to the Academy in 1955.

I am a member of the San Francisco Medical Society, California Medical Association, American Medical Association, Western Orthopedic Association, and the American Academy of Orthopedic Surgeons.

I am assistant clinical professor of orthopedic surgery at the University of California Medical School.

Q. I take it, then, Doctor, that you have specialized in the field of orthopedic surgery?

A. Yes, sir.

Q. That is your specialty? A. Yes, sir.

Q. Doctor, you examined several people at my request this past week, did you not?

A. Yes, sir. [607]

Q. And one of the men examined was Joseph Salmeri? A. Yes, sir.

Q. Will you just state what the examination was that you conducted? First, may I ask you, did you take any X-rays in connection with Mr. Salmeri?

A. Yes, sir.

Q. You may refer to the X-rays, and you just

(Testimony of Arthur A. Civello.)

go ahead and state what your examination consisted of, please, what you found.

A. The examination consisted of the history of the injury, his medical treatment, his past history as far as previous injuries or illnesses were concerned, the complaints that he mentioned—that is, any symptoms—a complete surgical examination and orthopedic examination, X-rays, review of the X-rays—do you wish me to go through the history?

Q. Yes; if you will, please.

A. All right.

The Court: I don't think it is necessary for the history. This doctor was not retained to treat the patient. He was retained only to examine and to evaluate the injury alleged to have been sustained.

Mr. Nave: Only, your Honor, with reference to subjective complaints. It goes to the question of present complaints that the patient may have.

The Court: All right. [608]

The Witness: Well, limiting the discussion then to the present complaints. The patient reported pain in the right wrist with movement, and aches where he has scars along the forearm. He always feels as if there is a tight grip, and he mentions that that feeling is about the site of his fractures.

When he washes his face, he feels a sharp pain along the middle finger of the right hand, and he states that there is a tingling sensation if he taps the scar along the radial styloid.

He has occasional pain in the right shoulder and when he exercises he feels a click. Throwing objects

(Testimony of Arthur A. Civello.)

hurts the right shoulder, which may also ache when he lies down.

He reported that three months ago he developed some pain along the left side of the neck and he saw his private physician who advised him that there was nothing wrong and he stated that the neck discomfort was brought on whenever he started to smoke.

He reported no other symptoms or pains and he states except for the fact that the right arm feels weak and hurts, he has no head symptoms, and he does not feel that he is capable of working as a fisherman.

Also, he mentioned the fact that he could not fully extend the first, third and fifth fingers of the right hand. [609]

Q. (By Mr. Nave): Now, Doctor, did you take some X-rays in connection with this man's arm?

A. Yes, sir.

Q. Do you have the X-rays present?

A. Yes, sir.

Q. Will you take the X-rays and tell his Honor what the X-rays reveal?

The Court: First have the X-rays marked in evidence.

Mr. Nave: Yes. We offer them, your Honor.

The Court: Leave them right in the envelope. And mark the envelope, consisting of how many X-rays are there, Doctor?

The Witness: Six X-rays.

(Testimony of Arthur A. Civello.)

The Clerk: Respondent's Exhibit P introduced and filed into evidence.

(Group of six X-rays received and marked Respondent's Exhibit P in evidence.)

The Witness: The X-rays revealed a healed fracture of the right clavicle, a healed fracture of the right radius, and a non-union of an ulnar fracture, and a metallic pin across the olecranon process of the ulna.

There was also some demineralization of the wrist and hand and some soft tissue calcifications in the region of the mid-shaft fractures which appear smooth and old. [610]

The Court: What do you mean, Doctor, when you say the X-ray revealed a non-union of the ulna fracture?

The Witness: The patient evidently sustained a fracture of the right radius and right ulna. He had several operative procedures which hastened or resulted in union of the radial fracture but, as sometimes happens, the ulna proceeds to non-union, that is, a failure of union at that fracture site.

The Court: So there is a space or an interval between the bones, two pieces of the bone of the ulna?

The Witness: Yes, your Honor.

The Court: How big is that space?

The Witness: I believe it measures about two to three millimeters. It's probably filled with scar tis-

(Testimony of Arthur A. Civello.)

sue. So instead of a bony union, he has a fibrous union.

The Court: And how are those two pieces held together, by a metallic substance?

The Witness: According to the history, the patient had probably rush rods placed down the intramedullary canal of each bone and these were subsequently removed at two separate operations in, I believe, 1956.

The Court: Is that an indicated treatment?

The Witness: Yes, sir.

The Court: For an injury of this type?

The Witness: Yes, your Honor. [611]

Q. (By Mr. Nave): And, Doctor, what other conclusions and findings did you make in reference to Mr. Salmeri's condition at the time of your examination?

A. Well, on examination he had very minimal limitation of motion about the right shoulder and slightly more limitation of motion about the right wrist and elbow which we felt was consistent with his injuries and plaster immobilization.

He had some weakness in grasp and some limitation of extension of the first, third and fifth fingers of the right hand. He was able to make a good fist with his hand. He had no limitation of flexion of the fingers.

The Court: You speak of some limitation in this respect and some limitation in that respect?

The Witness: Yes, sir.

(Testimony of Arthur A. Civello.)

The Court: Did you make an appraisal in terms of percentage?

The Witness: Yes, sir.

The Court: Will you give us that, please?

The Witness: I would say that as far as limitation in the right shoulder is concerned, that he has about five per cent limitation of motion.

In the right elbow I would estimate about 20 to 25 per cent.

And in the right wrist, I would estimate [612] between 35 and 45 per cent.

He has approximately 60 per cent loss in grasp of the right hand.

The Court: Would you say, Doctor, that he has a limitation of 60 per cent on the turning, the rotating of the hand?

The Witness: Rotations, in pronation he has less than 50 per cent; supination he has about 62½ per cent of supination—and those are considered as elbow motions.

Flexion, on the hand, is only decreased by about five per cent, and extension may be 15 per cent. And averaging those out, I think you might arrive at a suitable figure.

The Court: Would you say that this man Salmeri required a bone graft operation on the ulna?

The Witness: At this time, yes.

The Court: Would you just explain the nature of that operation to us, the details and what is the prognosis?

The Witness: The bone site, the fracture site

(Testimony of Arthur A. Civello.)

itself, is exposed, it is relatively easy to visualize, the scar tissue is removed, the bone ends are usually freshened, and any type of a bone graft may be used. It may, obtained from the tibia, it may be obtained from the iliac crest. Bone banks may be used. And then a long arm cast is applied and plaster immobilization is used until the fracture heals. [613]

Placing a bone graft is a definite aid to union in this type of a situation.

The Court: It doesn't appear that this doctor differs very substantially from Doctor Cox.

Mr. Nave: Yes.

The Court: In his appraisal of this man's injuries.

Mr. Nave: That's true.

The Court: All right, sir.

Q. (By Mr. Nave): Now, Doctor, the operation that you have indicated that this man will require for the ulna, that operation would be disabling, would it not? A. Yes, sir.

Q. And did you state your opinion as to the length of time of such disability?

A. Considering he is 36 years old and a fairly healthy individual, I would say that plaster immobilization would extend four to six months.

Q. And what is your opinion as to the future following such an operation as to a man's disability or ability to resume his normal occupation as a fisherman?

A. I would feel that finally doing the bone graft,

(Testimony of Arthur A. Civello.)

obtaining bony union, that the patient would then be able to use his arm and hand to a greater advantage and with a lesser amount of pain, which in itself would then increase his range [614] of motion about the right wrist and right elbow, possibly about the right shoulder; I would also feel that with——

The Court: Increase it to what extent, Doctor?

The Witness: Well, I would say this, that the man would have a limitation of motion about the right wrist and elbow; I would approximate in the range to ten to 15, 20 per cent. I would expect his grasping power to improve because with persistent use of the hand there should be a definite amount of improvement, with some limitation of motion; he would probably have some limitation in grasp, certainly not to the degree that he has now.

I would feel that with a better range of motion, with a lesser amount of discomfort, with a union of the present non-union, that the man could return to work as a fisherman, feeling and knowing that he would have some limitation of motion, but I don't think that it would be disabling.

The Court: Would you at the present time say he would be unable to perform the arduous duties of a fisherman?

The Witness: Yes, sir, your Honor.

Mr. Nave: Does your Honor prefer the cross-examination be conducted as to each patient or should I continue as to the others?

The Court: I don't know. I cross-examined the doctor summarily.

(Testimony of Arthur A. Civello.)

Mr. Vartan: I just have one question. [615]

The Court: Suppose we take up each patient separately.

Mr. Nave: I think it would be better.

The Court: Do you have any questions to ask the Doctor?

Mr. Vartan: Yes, one question.

The Court: I didn't observe much difference.

Mr. Vartan: Well, I think——

The Court: All right, go ahead.

Cross-Examination

By Mr. Vartan:

Q. Doctor, from your examination did you also come to the conclusion that there is a necessity of a tendon graft operation?

A. No, sir. This man has limitation of extension of the thumb, middle and little finger which I felt was due to adherence of the extensor muscles in the forearm along these two scars that he had. He does not need a tendon repair. He simply needs the placement of some fatty tissue between the scar and the muscle bellies, which probably would improve his range of motion in that.

Q. Doctor, didn't you find that he has no control over the thumb, and in certain positions that it drops, drops down next to the palm?

A. No, sir. I felt that he lacked full extension or abduction of the thumb, but that he had active motions. The [616] tendons were intact.

(Testimony of Arthur A. Civello.)

Q. What specific findings did you make with reference to the thumb?

A. As far as the right thumb is concerned, I felt that he had 30 per cent loss of abduction—that would be motion in this direction (indicating); and 30 per cent loss of dorsiflexion of the right thumb, those motions being limited, as mentioned before, by scar adherence.

Q. I will ask you a specific question, Doctor: You having in mind other medical testimony here, didn't you find that there is a complete loss of action of the extensors of the thumb, the patient being unable to extend his thumb because of loss of activity of the long extensors?

A. No, sir. The man has an intact extensor tendon of the long extensor tendon of the thumb. I feel that his type of injury bears this out. He had fractures of both bones of the forearm and they were simple fractures, they were not compound fractures.

The Court: Weren't they comminuted fractures, Doctor?

The Witness: I would presume so from the—by 'simple,' I mean there was no breaking through of the bone through the skin, your Honor.

Q. (By Mr. Vartan): Doctor, how does a doctor tell whether there has been [617] the loss of—complete loss of extensor tendon function? That does not show in X-rays?

A. No, sir; it shows on clinical examination.

Q. I see.

(Testimony of Arthur A. Civello.)

The Court: What would be the cost of this bone graft operation or reasonable professional charges?

The Witness: Well, your Honor, I can only quote our usual office fee. For a bone grafting procedure we would charge in the neighborhood of three to four hundred dollars, including the initial examination and total follow-up care.

The Court: And what would be the hospital charges, approximately, for this operation?

The Witness: Well, the patient would have to be hospitalized for ten to fourteen days. Hospitalization would run in the neighborhood of probably \$30.00 a day. That would be three hundred to four hundred and twenty dollars, and I would say that a hospital fee of \$500.00 would not be unreasonable.

He would have cast changes about every four to six weeks. He would need roughly four cast changes. The hospital charge for the plaster runs in the neighborhood of ten to twelve dollars per cast change.

He would need X-rays at each time, and that would also run about twelve and a half dollars.

The Court: Would it be fair to say that the total reasonable charges for the operation, care, post-operative care, [618] hospitalization and treatment would be between one thousand and twelve hundred dollars?

The Witness: Yes, sir.

The Court: Now, then, after that he would be an out patient, would you say, for about six months?

(Testimony of Arthur A. Civello.)

The Witness: Four to six months, followed in our office.

The Court: He would have to come in occasionally?

The Witness: Yes, sir.

The Court: And during that period he couldn't do any hard work, could he?

The Witness: No, your Honor.

The Court: He really should be convalescent and rest his arm during that period?

The Witness: Yes, your Honor.

The Court: All right, six.

Mr. Vartan: One more question, your Honor.

Q. (By Mr. Vartan): What is your opinion about the success of the bone graft operation? They don't always turn out; I mean, sometimes you have to do them over again, don't you?

A. Well, that is certainly a possibility. I could say this, that they are usually successful in this particular site.

Q. That is as far as you can go, though?

A. No; I would have to say that there is a possibility that [619] it may not go on to union, but the probability is that it would unite.

Q. If it doesn't, if there is no union at the first attempt, then the entire procedure as you have outlined would have to be repeated, isn't that true?

A. Yes, sir.

Q. And there are cases where they may have to repeat it several times, isn't that right?

A. Yes, but very unlikely.

(Testimony of Arthur A. Civello.)

The Court: There are cases where you get an osteomyelitis?

The Witness: Yes, your Honor.

The Court: I mean, you can't predict with certainty?

The Witness: All you can do is estimate and evaluate as to what your previous experience has been and what the experience of other orthopedic surgeons has been.

The Court: Do you have any questions?

Mr. Silvers: No questions.

Further Direct Examination

By Mr. Nave:

Q. Now, last week, did you also examine Mr. Frank Pedrasaz at my request? A. Yes, sir.

Q. And would you state what history you took from him, particularly with reference to any present complaints? [620]

A. Yes, sir.

I think, importantly, we might mention the fact that the patient returned to work in July or August of 1955, working as a fisherman for three to four months, and then changed jobs so that now he is a butcher in a slaughter house.

He has seen no doctors since his return to work in July or August, 1955.

As far as his present complaints are concerned, in taking the history from the patient, it seemed to me that he had a contusion or a sprain of the right

(Testimony of Arthur A. Civello.)

ankle and a fracture of the right wrist, and it seemed that he had a bone grafting procedure performed to the fracture of the right wrist. So as to his present complaints, he felt that the right ankle was uncomfortable over the medial malleolus with prolonged weight bearing.

The bone graft was taken from the right iliac crest and he stated that with cold weather he gets a pain in the entire right leg.

As far as the wrist was concerned, he felt that the fingers of the right hand felt asleep and that cold weather caused some discomfort.

He had pain about the right wrist and he pointed to the distal part of the radius and he stated that occasionally he had to use his left hand in his [621] present occupation.

He was examined, general physical examination and orthopedic examination. He demonstrated no atrophy of the muscles of the right arm or forearm.

He had some difference, one-quarter of an inch, which is not too much, the right thigh being less than the left, but he had amputation in 19—I believe 1939—of all the toes of his right foot.

His grasp—he would feel—would be decreased at least on examination by, I would say, 40 per cent, which was hard to understand when you realize that he had no atrophy of the arm or forearm and he also was able to make a full fist with the right hand, and also the right hand had definitely more callous formation than the left hand, showing more use of the right hand than the left.

(Testimony of Arthur A. Civello.)

His limitation of motion about the right wrist was of very slight degree, I would say probably be five per cent.

Q. Did you make any examination, Doctor, testing as to his gripping power? A. Yes, sir.

Q. What did you find?

A. Well, as I mentioned, his grip on formal examination, it would appear that he had apparent loss of 40 per cent, and, as I mentioned, this was somewhat hard to understand in the [622] light of the remainder of the physical examination.

The Court: Doctor, did you know that he had a section of the transverse carpal ligament——

The Witness: I had no medical reports available to me, your Honor.

The Court: If I tell you that the record of the U. S. Marine Hospital shows that in February, 1955—he had an operative procedure in 1955, February, and there was a bone graft of the right radius and a section of the transverse carpal ligament, would that explain why he would have this loss of power in his grip?

The Witness: No, your Honor. I feel that to have a loss in grasping power of that degree that the man would have to show atrophy of the musculature, and also he would probably have more callous formation on his left hand than he had on his right.

There is another thing that you have to consider, on sensory examination to pinprick the man demonstrated a complete hemianesthesia over the right

(Testimony of Arthur A. Civello.)

side of the body. This is an anatomical finding, it is not an objective finding. I would feel——

The Court: Was this hypesthesia over the entire right side of the body?

The Witness: Yes, your Honor, including the right leg, right trunk, right shoulder, right face, right head, [623]

The Court: What is that? Indicative of some brain injury?

The Witness: No, your Honor. The cranial nerve examination was normal; the reflexes were normal. The man has no atrophy of his musculature, and you might call it a functional thing.

The Court: Where is the thenar muscle located?

The Witness: The thenar muscle group?

The Court: Yes.

The Witness: This is the thenar muscle group here, your Honor. It's the bulk of the musculature of the thumb.

The Court: The notation from the Marine Hospital reads that examination reveals a flattening of the right thenar muscle group and hypesthesia over the right hand on the volar aspect of the index, middle and radial half of the ring finger.

Now, did you find any flattening of the right thenar muscle group?

The Witness: No, your Honor. Might I ask what the date of that examination is?

The Court: Apparently this is a notation from October, '54, U. S. Marine Hospital.

The Witness: Well, that finding would certainly

(Testimony of Arthur A. Civello.)

be understandable. It is a month after his injury and three years, almost three years have elapsed since that time. [624]

Q. (By Mr. Nave): Doctor, do you have an opinion as to whether or not Mr. Pedrasaz is disabled from working? A. Yes, sir.

Q. What is your opinion?

A. I feel that the patient is capable of continuing his occupation as a fisherman, that he has this limitation, minimal limitation of motion in the right wrist which requires no specific treatment at this time, and which you might consider as being permanent since three years have elapsed since his injury.

Q. Doctor, did you have any X-rays made in connection with Mr. Pedrasaz? A. Yes, sir.

Mr. Nave: And I will ask those X-rays be produced in evidence.

The Clerk: Respondent's Exhibit Q introduced and filed into evidence.

(Six X-rays received in evidence and marked Respondent's Exhibit Q.)

Q. (By Mr. Nave): I hand you Respondent's Exhibit Q, being the X-rays of Mr. Pedrasaz, and I will ask you to state to his Honor what these X-rays reveal?

A. He has an area of calcification along the periosteum of the right ilium which indicates the site of the bone graft, [625] and he has a healed fracture of the distal end of the radius. He had

(Testimony of Arthur A. Civello.)

some os porosis of the bones of the right foot consistent with his 1939 amputation due to frost bite.

Basically those were the findings.

Mr. Nave: You may examine.

Cross-Examination

By Mr. Vartan:

Q. Doctor, didn't your X-rays of the right wrist indicate an impacted fracture, a healed impacted fracture?

A. I think that you could consider that as being an impacted fracture at the time of injury.

Q. All right. Now tell his Honor what impacted fracture means.

A. An impacted fracture is one where one fragment is driven into the other, and I would presume that that was the reason for the bone graft procedure, to restore length to the radius.

Q. Well, the ends of the bone that finally united indicate an impaction, in other words, as the man's wrist exists today, it is an impacted fracture healed in an impacted manner?

A. This type of injury is always an impacted fracture, just from the nature of the trauma. You can't call it a disimpacted type of fracture and the amount of impaction is not of a very great degree because the radial length has been restored.

Q. Doctor, what does the term "radial deviation" mean? [626]

(Testimony of Arthur A. Civello.)

A. Radial deviation means a shift of position of the radius to the radial site.

Q. Didn't you find from your history and examination that that wrist, that impacted fracture which was healed with the aid of a bone graft, shows a tendency towards radial deviation?

A. Well, I would say no. A tendency to radial deviation doesn't mean anything to me because it either has radial deviation or it doesn't have radial deviation.

Q. All right. Does it have radial deviation?

A. No, sir.

Q. You stated that he had a contusion or sprain of the right ankle. If I were to call your attention to the records of the Marine Hospital, dated 12-8-54, the notation that he had a fracture of the articular surface of the right tibia, would your findings be consistent with that finding taken at that time?

A. Well, I would say this, that if the man had a fracture of the articulating surface of the right tibia, it has healed in excellent position, excellent alignment, and there is no evidence of such injury at this time.

Q. In testing a man's wrist, I assume—what is it, dorsiflexion of it—all right.

Now, what were your findings of dorsiflexion of the injured hand as compared with the left or uninjured hand?

A. 65 degrees on the right; 68 degrees on the left.

(Testimony of Arthur A. Civello.)

Q. Are you sure that it wasn't 75 degrees on the left? [627] A. Yes.

Q. What is the palmar flexion?

A. 58 degrees on the right; 62 degrees on the left.

Q. And show his Honor what is meant by palmar. A. (Demonstrating.)

Q. All right. Now, that limitation in those figures is a permanent situation, is it not?

A. Yes, sir.

Q. Did he complain to you of tenderness and swelling of the right wrist when using or gripping too often?

A. He mentioned the fact that his right hand did ache.

Q. Having in mind the history which you obtained, is such a complaint unusual?

A. Oh, I would say that if the man had minimal subjective symptoms that they would not be unusual. I don't feel that they would be disabling in view of the physical examination, in view of the X-ray findings.

Q. Doctor, you said that it was hard to understand his loss of grip or grasp. Did you mean to imply that this man was a malingerer?

A. I didn't mean to infer anything. All I mean to draw—mention the fact that this man has no findings, other findings, which would substantiate a loss in grasping power of that degree in the right hand.

Q. Doctor, does the disturbance or injury to the

(Testimony of Arthur A. Civello.)

sensory [628] division of the radial nerve in a fracture and subsequent bone graft operation of this kind, doesn't that ever result in a loss of grasp?

A. Oh, I don't think that I have mentioned the fact that the patient might not have some loss in grasping power, but I would certainly place it in the percentage of his limitation of motion. Grasp is a function of the median nerve and the ulnar nerve which serve the flexors of the fingers.

Q. This man had a comminuted fracture, did he not, of the distal end of the radius?

A. Yes.

Q. All right. The comminuted fracture could have severed the field of the sensory nerves in that area, could it not?

A. It could have, but it didn't.

Q. How do you know it didn't?

A. He has no sensory loss at this time.

Q. How did you determine that?

A. Pinprick examination.

Q. Is it your testimony that this man's complaints of loss of feeling and numbness in the fingers of the injured hand are not based upon fact?

A. This man has a total loss in hypesthesia on the right side of the body, not limited to the radial nerve itself, and I don't think you could state that the man had a radial nerve injury. He has no motor loss and he has no reflex changes [629] and he has no atrophy.

Q. Let me ask you, Doctor, when you tested the fingers of the right hand, the fingers that he com-

(Testimony of Arthur A. Civello.)

plained of numbness in, did you find from your examination of the fingers alone that he had sensitivity there?

A. The man had sensitivity on his whole body but, as I mentioned before, he mentioned the fact that the entire right half of the body had a lesser degree of sensation than the left half of the body, no particular area more hypesthetic, you might say, than any other part of the body on the right side.

Q. I ask you again: When you examined by pin-pricks or any other method for the numbness of the fingers of the right hand, did you find that the numbness was not there?

A. No. I think I have already testified that the man has a hypesthesia of the right half of the body. So, therefore, I would have to include the area of skin supplied by the radial nerve.

Q. You said in your opinion his grasp was 40 per cent in the injured hand, is that right?

A. Yes, sir.

Q. And how did you test that?

A. By dynamometer.

Q. In your opinion, is that condition permanent?

A. Well, I don't feel that his grasp on examination is [630] a true indication of what the man should have.

Q. Well, let's come out with it, Doctor. Do you think when he performed that test with the—whatever that grasping meter or thing is—do you feel that he was trying to pull a fast one?

A. I don't know. All I can say is that from the

(Testimony of Arthur A. Civello.)

remainder of my examination I would certainly feel that the man would have a greater amount of grasp.

Q. If I were to call your attention to the records of the Marine Hospital where tests there show a lack of grasp, an absence of grasp up until eight to nine months after this injury, would that tend to change your views? A. No, sir.

Mr. Vartan: That is all.

Mr. Silvers: No questions.

The Court: Thank you, Doctor.

Mr. Nave: One more patient, Judge.

Further Direct Examination

By Mr. Nave:

Q. You also examined another patient named Mr. Belleci? A. Yes, sir.

Q. Will you state what history you obtained from Mr. Belleci as to his complaints?

A. Yes, sir. The patient reported that with foggy weather he had some discomfort over the left side of his low back and [631] he states that it possibly could ache for one hour to two days, but stated that it was not disabling.

Occasionally he had some discomfort when he stooped, but lifting caused no discomfort.

He had no pain in his legs, no arm symptoms, no numbness or tingling, but he states that occasionally he had some discomfort up the left side of the neck.

Also, the man initially was given a back support, which he had not worn for the past six months.

(Testimony of Arthur A. Civello.)

When he returned to work in September, 1955, he returned to light duty, but states that he does everything at the present time.

Examination—I could shorten this by stating that on physical examination—revealed nothing particularly.

The orthopedic examination was also normal.

The patient had no list, no sclerosis, no tenderness, no muscle spasm, and a complete range of motion.

The straight-leg raising maneuver was normal, the Lasegue's sign was normal, cranial nerves were intact, reflexes were normal, sensation was normal, and motor power was normal.

The Court: Did you take X-rays of this man's T-12? Tell the lawyers what T-12 is.

The Witness: T-12 is the 12th dorsal body, that is, there are seven cervical vertebrae, 12 dorsal vertebrae, and five [632] lumbar vertebrae—five, four, three, two, one, yes, your Honor.

The Court: Do you want to put these X-rays in evidence?

Mr. Nave: Yes, your Honor. I will put the X-rays in evidence.

The Clerk: Respondent Union Oil Company's Exhibit R introduced and filed in evidence.

(X-rays received and marked in evidence Respondent Union Oil Company's Exhibit R.)

The Court: This man claims injury to his back. You offer them in evidence?

(Testimony of Arthur A. Civello.)

Mr. Nave: Yes.

The Court: Any objection to that?

Mr. Vartan: No, your Honor.

The Court: How many X-rays are there?

The Witness: Eight, your Honor.

Q. (By Mr. Nave): Doctor, first let me ask you what do the X-rays show as to anything abnormal?

A. He had some narrowing of the fourth intervertebral disc space and hypertrophic changes at all levels, and the anterior vertical height of the 12th was somewhat less than the posterior height, and there was some, as mentioned before, some [633] fringing.

Basically, those were the findings.

Q. And do you have an opinion as to the cause of the narrowing that you mentioned and the hypertrophic changes?

A. Oh, I think the hypertrophic changes and the narrowing are consistent with his age. The difference in the vertical height could be very easily determined as far as the cause is concerned if you had the initial X-rays.

The Court: Would you say they give evidence of degenerative arthritis?

The Witness: Yes; there is evidence of degenerative arthritis.

The Court: And assuming that the X-rays taken immediately following this explosion, September, 1954, showed this condition to be present in this man's back, would a jarring or injury bring about

(Testimony of Arthur A. Civello.)

an aggravation of that condition which would cause him pain?

The Witness: Well, I feel that the man, according to the history, had an injury, he had pain, which is part of the record, I would feel that there would be no specific aggravation of the condition itself. I think that his pain could be explained on the basis of his injury, and we know that degenerative arthritis is a progressive thing.

The Court: Could it be aggravated by trauma?

The Witness: If it brings on pain, I would say yes. But to imply that the pain and the aggravation would appreciably [634] alter the hypertrophic changes, I would say no. I think it is a matter of what one means by aggravation. If one means the onset of pain, I think the answer is yes. If you mean that the arthritis is going to be made definitely worse over and above what you might expect with the passage of time, I think that the answer would probably be no.

Q. (By Mr. Nave): Did you find any evidence, Doctor, that this man has been disabled from pursuing his occupation?

A. I think that the man speaks fairly well for himself. He is doing his regular occupation. He lifts without difficulty. He has a normal physical examination. And a man of this age, if you wanted to go as far as to the symptoms during foggy weather, they are also consistent with his age and X-ray findings.

Mr. Nave: Thank you. You may examine.

Mr. Vartan: No questions.

The Court: All right.

Mr. Silvers: No questions.

(Witness excused.)

The Court: I was very much impressed with the medical testimony offered by both sides here. It is refreshing to have competent doctors so fairly and impartially answer and present the result of their examination. It is indicative of very high professional standards of the medical profession [635] and it is refreshing in this case.

Mr. Nave: May we have our morning recess?

The Court: All right.

(Short recess taken.)

Mr. Nave: At this time, your Honor, I would request Mr. Silvers to produce the reports of the survey.

The Court: Oh, yes; you were going to give him the reports of your survey.

Mr. Silvers: Your Honor, I have survey reports for the years 1954, '53 and '52, which I will give to Mr. Nave at this time, of the boat Santa Lucia. And, if your Honor thinks it will be helpful, we also have the sketches of the various parts of the ship, the anatomy made by Captain Hanson, the surveyor.

The Court: I think it would be helpful. We have at the present time no sketch of this ship showing the layout of the various parts.

Mr. Silvers: It shows the engine room detail.

The Court: It might be very helpful.

Mr. Silvers: If it is agreeable to everyone, I will offer these into evidence at this time. At this time I am referring to six photostatic diagrams, which I think all of you have seen before, one showing the detail of the galley, side view of the engine room and the gas tank position, detail of the fittings from the gas tank to the pump, and auxiliary [636] engine, further details on the pump, push board arrangement, and the diagram of the engine room with the positioning of the main engine, the pumps and the gas tank.

Mr. Vartan: No objection.

The Court: These were made by the surveyor?

Mr. Silvers: Captain Hanson.

The Court: And when were they made, in the course of a survey or were they made after the accident?

Mr. Silvers: They were made during a deposition taken of Captain Hanson by Mr. Nave.

The Court: And made from his recollection?

Mr. Silvers: That is correct, sir.

The Court: After the accident occurred?

Mr. Nave: That's right, your Honor.

Mr. Silvers: Each of them is dated 11-28-55.

The Court: They will be received in evidence, and by consent, being sketches showing in a general way the layout of the various equipment and appliances aboard the Santa Lucia.

The Clerk: Respondent Cardinale's Exhibit S introduced and filed into evidence.

The Court: It consists of how many separate sketches, so we will have it on the record?

The Clerk: Six, your Honor.

(Six sketches re layout of Santa Lucia received in evidence and marked Respondent Cardinale's Exhibit S.) [637]

Mr. Nave: I will offer into evidence at this time, if the Court please, the inspection report made by the marine surveyors Genereaux and Hanson dated May 6, 1952.

The Clerk: Respondent Union Oil Company's Exhibit T introduced and filed into evidence.

(Inspection report dated May 6, 1952, received in evidence and marked Respondent Union Oil Company's Exhibit T.)

Mr. Nave: The second inspection report made by the marine surveyors Genereaux and Hanson dated September 14, 1953.

The Clerk: Respondent Union Oil Company's Exhibit U introduced and filed into evidence.

(Inspection report dated September 14, 1953, received in evidence and marked Respondent Union Oil Company's Exhibit U.)

Mr. Nave: And the third inspection report or the report of survey made by the marine surveyors, Genereaux and Hanson, of the fishing vessel Santa Lucia on September 10, 1954.

The Clerk: Respondent Union Oil Company Exhibit V introduced and filed into evidence.

(Inspection report dated September 10, 1954, received in evidence and marked Respondent Union Oil Company's Exhibit V.) [638]

GEORGE WASHBURN

a witness called by and on behalf of Respondent Union Oil Company, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court, sir.

The Witness: George Washburn.

Direct Examination

By Mr. Nave:

Q. Mr. Washburn, where do you live, sir?

A. In Corte Madera.

Q. What is your profession or occupation?

A. I am senior analyst for the Standard Oil Company of California.

Q. And how long have you worked for the Standard Oil Company? A. 23 years.

Q. What positions have you held while working for the Standard Oil Company?

A. I have been an ordinary seaman, a ship's officer, and a safety engineer.

Q. What period of time were you a safety engineer for Standard Oil Company?

A. For 15 years and nine months.

Q. Mr. Washburn, what is your educational background?

A. I had two years at the University of California. [639]

Q. During the period of time that you have been employed by the Standard Oil Company of Cali-

(Testimony of George Washburn.)

fornia, have you had occasion to investigate fires and explosions aboard ships and around marine installations? A. Yes, sir.

Q. Are you acquainted by experience with the general behavior of gasoline and petroleum products? A. I am.

Q. Now, Mr. Washburn, before coming into court, you had had an opportunity to examine the marine survey inspection report which was made by Captain Hanson of the fishing vessel Santa Lucia, one in September of 1953 and another one on September 10, 1954, have you not, sir? A. I did.

The Court: I was just observing—if I could interrupt a moment——

Mr. Nave: Certainly you may.

The Court: These sketches, Respondent's Exhibit S, do I understand—may I ask this witness a few questions?

You are familiar with ship construction, are you?

The Witness: Yes.

The Court: You looked at these sketches?

The Witness: No; I haven't.

The Court: Would you look at them for a few moments and I would like to get your interpretation of them to see [640] whether I interpret them correctly?

(Witness examining.)

The Court: Go ahead and take your time on it. I hope you don't mind me doing this?

Mr. Nave: No; it's quite all right.

(Testimony of George Washburn.)

The Court: It might interrupt your course of examination, but I would like to make sure that I interpret these sketches correctly.

Mr. Nave: It's perfectly all right, your Honor.

The Court: Because I regard this as a very important part of the case.

(To the witness): As you are looking at the sketches would you pay particular attention to the gas tank, the location of the gas tank, and the piping leading from the gas tank, and where those gas feeds lead to from the gas tank?

(Witness examining.)

The Witness: Yes, sir.

The Court: When you are finished, let me know. I want to ask you a few questions.

The Witness: All right. I think I am finished with them. They leave something to be desired in the way of ship drawings, but they do give us a general idea.

The Court: Where would you say the location of the gas tank is shown to have been on this ship as revealed by those drawings? [641]

The Witness: It is shown to be in the engine room up in the overhead.

The Court: What do you mean by "in the overhead"?

The Witness: Well, it is made fast to the ceiling.

The Court: And where would you say it was with reference to the deck of the galley?

The Witness: Well, let me study these a bit. It's

(Testimony of George Washburn.)

fastened to the overhead, which is the deck—that is a part of the galley deck. It is not directly under the galley but it is the same deck level that runs through forming the deck of the galley and the deck of the crew's quarters.

The Court: All right. How far would you say this gas tank was located from the forward bulk-head of the galley?

The Witness: Well, there is no scale shown on here but, just as a guess, I would say it is probably a foot or so.

The Court: Are there pipes leading from this gas tank?

The Witness: Yes, sir.

The Court: And how many pipes do you find leading from the gas tank?

The Witness: Two.

The Court: Where do they go to and what purpose do they serve?

The Witness: One feed line runs to the auxiliary generator and then that feed line continues to a pump called a [642] Wisconsin pump. And there is a second line that comes off the gas tank which ends in a valve. And that is a very poor installation, if that is what it actually shows.

The Court: Now, just what do you mean, that that is a very poor installation?

The Witness: Well, the Coast Guard have got requirements that state that you can't have any means of drawing off gasoline from a tank down in the engine room because it leads to very poor prac-

(Testimony of George Washburn.)

tices, such as if a crew member wants, say, gasoline to wash out a brush, why, they go down and open up this valve and draw it out.

The Court: It might also lead to leakage?

The Witness: It would, it could.

The Court: It could?

The Witness: Yes.

The Court: And you would say that that was very poor seamanship?

The Witness: Very poor construction.

The Court: Poor construction?

The Witness: Yes.

The Court: Can you give me any description from those drawings, Respondent's Exhibit S, as to the type of piping which led from this gas tank?

The Witness: Well, it's copper piping and it's quarter-inch O.D. and five-thirty seconds. [643]

The Court: What do you mean by quarter-inch O.D.?

The Witness: Quarter-inch outside diameter.

The Court: Outside diameter?

The Witness: Yes, sir.

The Court: That is copper piping, quarter-inch O.D., and that goes where?

The Witness: That runs to the auxiliary generator and to the Wisconsin pump.

The Court: Does it show any intermediate valves between the gas tank and the auxiliary generator?

The Witness: Yes, sir. There is a—what I would call a foot valve where the line leaves the tank and

(Testimony of George Washburn.)

there is a valve at the auxiliary generator and one at the pump.

The Court: So that altogether on this tank then you find four valves?

The Witness: Yes, sir.

The Court: One which would be called a drain valve, I take it?

The Witness: That is right.

The Court: And that does not connect then to anything else, that is simply a drain valve?

The Witness: Not as shown here, yes, sir.

The Court: And then the other is a valve on the piping which runs from the tank to the auxiliary generator and the auxiliary—on the Wisconsin pump—— [644]

The Witness: Yes, sir.

The Court: That's up—is that located near the tank?

The Witness: That is quite close to the tank.

The Court: And then there is another valve where the piping comes into the auxiliary generator?

The Witness: That is right.

The Court: And another valve where it comes into this Wisconsin pump, is that correct?

The Witness: Correct, sir.

The Court: Can you tell me just what type of engine that auxiliary generator has?

The Witness: No; I can't. All I can say it's a gasoline engine.

The Court: You can't tell how it is started?

(Testimony of George Washburn.)

The Witness: No; I can't.

The Court: Whether it has an electric starter or has to be cranked?

The Witness: No.

The Court: Can you give me any information as to the type of auxiliary pump engine, that Wisconsin pump?

The Witness: Once again, all I can say from this evidence here is that it was a gasoline engine pump.

The Court: But how it started, you don't know?

The Witness: No, sir. [645]

The Court: Whether it had to be hand cranked or had an electric starter, you don't know?

The Witness: I don't know.

The Court: Will you tell me what purpose the auxiliary generator serves or served aboard this ship, if you can, from these sketches?

The Witness: I can't tell from these sketches, but from general knowledge, why, I would say they could use it to charge their batteries. I note they have, from one of the other reports, they had 120-volt system battery system.

The Court: Do those sketches show the location of the storage batteries?

The Witness: As far as I can tell, they don't.

The Court: Now, do those sketches show the Diesel motor that powered this craft?

The Witness: Yes, sir.

The Court: Can you tell from those sketches something about the type or nature of that Diesel motor?

(Testimony of George Washburn.)

The Witness: No; I can't.

The Court: Are you familiar with the Diesel motors which are in fishing sloops of this type?

The Witness: I would say that the only experience I have had with Diesel motors has been with some of the Diesel launches that we operate. Now, generally speaking, they are more or less the [646] same.

The Court: How are they started after they have been turned off?

The Witness: They have different types of starting mechanism on them. Sometimes they start by air, and sometimes they have got what they call hydrostatic starters on them, which they work up a pressure by hydrostatic means, and sometimes they are started by electricity, just like an automobile.

The Court: And what gives the spark, a spark-plug?

The Witness: No. The Diesel engine is made to rotate by an electric starter, motor——

The Court: Yes.

The Witness: And the compression in the cylinders provides the ignition.

The Court: The compression in the cylinders?

The Witness: Yes, sir.

The Court: So that you don't need any flame or pilot flame going on a Diesel engine aboard a ship?

The Witness: No, sir.

The Court: Could you give me some idea as to about how many storage batteries you would find

(Testimony of George Washburn.)

in a fishing sloop of this type, or would expect to find; how big they would be?

The Witness: I have never seen a battery installation on a fishing sloop of that sort, and I would expect to find, if it is a 120-volt system used for starting the engine, [647] a very considerable number of them.

The Court: Are you familiar with the characteristics of storage batteries?

The Witness: To some extent, yes, sir.

The Court: You say that you seldom—did I understand you to say that you seldom have seen a storage battery system on a fishing sloop of this kind?

The Witness: I don't believe I said that.

The Court: I might have misunderstood you. That's the reason I asked you again. What did you say with reference to that?

The Witness: Well, I am not familiar with the actual physical details of a fishing vessel.

The Court: I see.

The Witness: Except as it is related to equipment in our own vessels, our own boats.

The Court: Do you know whether or not those storage batteries give off a gas, are you familiar with that?

The Witness: Yes, sir. When they are charged, why, they will give off hydrogen gas.

The Court: Do you know what effect, if any, a combination of that gas, which is thrown off by batteries, with gasoline vapor, might have?

(Testimony of George Washburn.)

The Witness: Well, hydrogen gas is explosive in itself and it would have no chemical relation to the gasoline [648] vapors.

The Court: All right.

Excuse me for having taken this witness away from you, but I wanted to get his explanation of these sketches, which I thought I understood but I wanted to get his expert confirmation.

You would say that the installation of this gas tank in that location was not in accordance with good marine architecture or seaworthy standards of construction?

The Witness: I would say that the specific thing of having a valve, a drain valve in the bottom of the tank is a violation of good practice. There is no reason a tank can't be installed ever in the overhead like that, if it is done in workmanlike manner and properly maintained.

The Court: Would you say that it should have some protection around it, some covering around it?

The Witness: No, sir. That could be undesirable, to cover it up, because when a thing gets covered up, it is out of sight, out of mind. It is far better to have it out in the open where you can see what is going on.

The Court: All right.

Q. (By Mr. Nave): Now, Mr. Washburn, I call your attention to one of the sketches made by Captain Hanson, marked Respondent's Exhibit S, and it shows a drawing of a gasoline tank, the dimensions are [649] given as 48 inches long, 24 inches

(Testimony of George Washburn.)

wide, and 6 to 8 inches deep. Now, the capacity of such a tank, Mr. Washburn, is in the area of approximately 30 gallons of gasoline, is it not?

A. Well, that's subject to calculation. I can't actually say one way or the other.

Q. Well, assuming for the purposes of this discussion, the question I am asking you, the capacity of that gasoline tank is approximately 30 gallons and assume, Mr. Washburn, that as shown on the sketch, that there is a fill pipe running from the top of the gasoline tank up to the top of the deck that is shown on one of these other sketches better and that the pipe extends above the deck and that there is an opening on the upper portion of the deck for the purpose of insertion of a nozzle to put gasoline in that tank——

Mr. Silvers: Did you say the pipe extends above the deck?

Mr. Nave: To the surface of the deck above the deck—and assuming that such a tank had a capacity of 30 gallons total, and assuming that any quantity of gasoline in excess of 30 gallons were put into that tank, what would happen when the capacity of the tank had been reached?

A. Well, normally run out on deck.

The Court: Come up through the intake?

The Witness: Yes.

The Court: Up? [650]

The Witness: The same as in the matter of filling an automobile tank too full.

The Court: That is, assuming that the tank was

(Testimony of George Washburn.)

intact and didn't have a hole in it and that the pet cock beneath was shut?

The Witness: That is right.

The Court: And that the valves leading to the engine were shut?

The Witness: Right, sir.

Q. (By Mr. Nave): Now, Mr. Washburn, I want you to assume certain facts in connection with the questions I am going to ask you. Assume that Mr. Hanson of the firm of Genereaux and Hanson, marine surveyors, had made a survey for insurance purposes of the fishing boat Santa Lucia on the 3rd day of September, 1954, which is approximately three weeks before the explosion and fire which occurred at Avila and which is the subject matter of this litigation.

Now, assuming that in this survey, which you have examined before, that the inspection made by Captain Hanson reveals the following conditions to be present on the fishing boat at that time:

General condition of vessel shows very poor maintenance and upkeep. Bilges filthy, dirty, black oil and grease, with considerable fuel oil on surface of bilge water. [651] Housekeeping very bad.

Tools and spare parts are all badly rusted, inoperative, and scattered in disarray throughout the engine room.

Cabin, galley and wheelhouse are all disorderly and dirty with filthy clothes and fishing gear scattered about.

Several loose and bad order light fixtures in

(Testimony of George Washburn.)

main house, especially in galley. Also in the power wire and switch to galley stove burner badly oil soaked and in very—it says good condition, but you may assume that is “very poor condition” for this purpose.

Main engine operated and tested for a period of approximately one hour. Operating pressures and temperatures normal from what gauges could be read. Several gauges are broken and inoperative.

And that these recommendations were made:

Install bilge electrical alarm. Weigh and fill all CO² fire extinguisher equipment, last filled 1950.

Clean the entire engine room and bilge area. Repair or renew if necessary all electrical outlets and wiring now hanging adrift.

Complete overhaul pyrometer, wiring and thermocouples.

Renew union on four-inch sea suction line [652] port side. Paper thin. Disintegrated when tapped with hammer during testing.

And assuming further that on the date of an explosion which blew up this fishing vessel, that immediately prior to the explosion and at the time of the explosion there was a fire or a flame on the galley stove located in the galley of the vessel which was described by the witness who was the cook of the fishing vessel as being on from one to a quarter of an inch in extent as to flame; and assuming those factors, and assume that gasoline was dumped into the engine room, into the area of the bilges of the Santa Lucia by a failure of the gasoline tank or the

(Testimony of George Washburn.)

valves connected thereto, I will ask you if you have an opinion as to the possible sources of ignition of gasoline vapors that would accumulate in the bilges of that vessel.

Mr. Silvers: We will object to the question, your Honor, on the ground that it assumes facts not in evidence.

The Court: We will take it for what weight—which I will give to it, I don't know. Objection overruled.

Q. (By Mr. Nave): Do you have an opinion?

A. I would say that by listing some of the possible sources of ignition which you might find in a fishing vessel at a time like that——

The Court: His answer is going to be [653] entirely speculative and I am the man to draw the inferences from the circumstances which are presented by the proof, not this witness.

Mr. Nave: I appreciate that, your Honor.

The Court: But if you want his answer on the record, put it on the record.

Mr. Nave: Thank you, your Honor.

Q. (By Mr. Nave): Go ahead, Mr. Washburn.

A. In investigating an explosion, why—could I elaborate a bit?

The Court: You can elaborate as much as you want because I am not going to pay a bit of attention to this testimony. I am simply letting it be put on the record so that there might be a complete record in the event of an appeal; if I make an

(Testimony of George Washburn.)

erroneous decision, it won't be necessary to have another trial.

The Witness: I see.

Investigating an explosion, why, you investigate three factors that make up a fire or an explosion: the source of air, the source of ignition, and the source of fuel. Well, in many cases, why, the source of air can be dispensed with. It is perfectly obvious.

Then you approach the next two and whichever seems to be obvious—whichever seems to be easiest to [654] investigate, why, you investigate that first. In this case it seems fairly obvious to me where the fuel came from. It's gas that came out of the tank.

Then we go to the source of ignition and that is not so obvious.

Now, here are the things that I would look for in an explosion on the fishing vessel under the conditions described:

First, I would want to know if there had been any smoking going on.

Secondly, if there are any open flames, such as this flame you described in the galley stove.

Thirdly, any automatic machinery, electrical machinery, that might start up and produce a spark. Again, any electric switches that might have been thrown, either manually or automatically that produce a spark.

Then lastly, I would examine the entire electrical setup for loose wiring, the batteries, for the possibility that something might have fallen across the terminals and produced sparking.

(Testimony of George Washburn.)

The Court: You look for one thing more, Professor, don't you? You look to see whether there is any condition which would create a friction which might give rise to static electricity and thereby produce a spark?

The Witness: It is possible. [655]

The Court: All right.

The Witness: Another thing I would look at would be the possibility of spontaneous combustion. In fact, I would put that up fairly high on the list.

And also the possibility of any smoldering rags that might have fallen on hot machinery.

Q. (By Mr. Nave): Mr. Washburn, are you familiar with the gasoline hose such as is represented here by Respondent's Exhibit J used in the marine service station terminals throughout the industry? A. Yes, sir.

Q. And the hose section that I am handing you here, I will also ask you whether or not that is standard hose that is used in the marine gasoline service stations throughout the industry?

A. That appears to be, yes.

Q. Now, that wire, the wires that you will see in the hose itself, are those wires in there for the purpose of bonding as well as insulating the hose?

A. That is what they are there for. They don't serve any useful purpose, but—

Q. Now, the material that the hose nozzle is made of appears to be some type of brass.

A. Brass or bronze.

Q. I will ask you if that is a standard type of

(Testimony of George Washburn.)

material and design that is used in the marine service station installations [656] throughout the industry? A. It is.

Mr. Nave: I believe that's all the questions that I have, Mr. Washburn.

The Court: We will adjourn to half past one.

(Whereupon, a recess was taken until 1:30 o'clock p.m. this date.) [657]

Afternoon Session—1:30 P.M.

GEORGE WASHBURNE

resumed the stand, being previously sworn, testified further as follows:

Cross-Examination

By Mr. Silvers:

Q. Mr. Washburne, you told us that your present position is that of senior analyst with the Standard Oil, is that correct? A. That is correct.

Q. How long have you held that position?

A. Since April 1st of this year.

Q. What is a senior analyst?

A. It is a position in an organization known as Operations Control, and we are creating or setting standards of sanitation, fire fighting, safety and many other matters, and seeing that they are applied on an equitable basis throughout our entire fleet. We now operate, in addition to our fleet on this Coast, a fleet back East—two fleets back East.

(Testimony of George Washburn.)

Q. Your experience as a seaman in the past has been on petroleum tankers, is that correct?

A. That is right. I was also with freighters for a short period of time.

Q. Petroleum tankers, a short time on freighters, and you worked up to a position of second mate, is that correct? [658]

A. That is right.

Q. Now, you haven't had any experience on fishing boats of the type we are talking about, is that right?

A. That is right.

Q. You have never been inside the engine room of the Santa Lucia, is that correct?

A. That is right.

Q. Have you ever been inside the engine room of a purse seiner of the type of the Santa Lucia?

A. No, sir.

Q. You have had no operational experience yourself with marine engines, is that right?

A. I am a yacht man. I have a 23-foot cabin cruiser and I am quite familiar with the engine of that boat.

Q. Aside from your 23-foot boat, you haven't had any experience with the operation of marine engines, is that correct?

A. Well, I have been not actually operating with them, no, if that is what you mean.

Q. Mr. Washburne, did I understand your testimony correctly that you felt it was not—withdraw that.

You have seen, have you not, in your experience as you have described it, auxiliary gasoline tanks

(Testimony of George Washburn.)

of the type that has been described to you and which you saw sketched on this diagram attached to the overhead of an engine, isn't that [659] correct?

A. That is right.

Q. And I think you told the Court that that in itself isn't in any way a violation of good marine practice, isn't that correct? A. That is correct.

Q. As a matter of fact, the only point that you felt was improper practice, if I remember correctly, was the existence of one valve, is that correct?

A. There's that, and there's another thing, too: It is better practice to have your lines leading from the tank come out at the top of the tank and extend down into the tank inside rather than come out of the bottom. The purpose of that is if your align breaks, why, the contents of the tank will not run out.

Q. Yes?

A. Although in some circumstances it still can.

Q. Even though it is above the tank?

A. That is right.

Q. You don't know whether this type of gas tank installation is standard or not on purse seiners, do you? A. No.

Q. If I remember correctly, the valve that you question as being possibly a violation of good practice was this valve that I am pointing to now, which on the diagram, Respondent's [660] Exhibit S, on the third sheet of this collective group of diagrams, Respondent's Exhibit S, marked at the bottom

(Testimony of George Washburn.)

"11/28/55," if I understood you correctly, it is this valve on the left bottom of the tank as we are looking at the diagram, that you question.

A. That is right.

The Court: That is really a pet cock, isn't it?

Mr. Silvers: I was going to ask the witness that.

Q. (By Mr. Silvers): Do you know what that valve actually was and the purpose it served?

A. I don't, no.

Q. You don't know anything at all about the valve?

A. No.

Q. Do you know of what it was made?

A. No.

Q. Do you know how much it extended below the lower part of the gas tank?

A. The only thing I know from that drawing is that it is marked as a valve.

Q. Right. And from that and that alone you concluded it is bad practice to have it there, is that it?

A. Right, sir.

Q. Did you ever hear of a bleeder valve, Mr. Washburne?

A. Yes. [661]

Q. What is it?

A. It is for draining the contents of the tank out of the tank.

Q. Water condenses and forms on the inside of a fuel tank, does it not?

A. It can, yes.

Q. And water condenses and can form on the inside of the auxiliary gas tank of the type we are talking about, right?

A. There could be water there.

(Testimony of George Washburn.)

Q. And it would lead to a general, a very undesirable condition so far as the operation of ship's engines which that particular tank might fuel if the water was simply left in the tank, isn't that correct?

A. Yes.

Q. It is undesirable to maintain a mixture of water and gasoline when gas is the fuel for a particular engine, isn't that right?

A. Well, your water wouldn't stay in the tank, it would run down into the——

The Court (Interposing): They wouldn't mix, would they?

Mr. Silvers: Well, they sit on top of each other, you're correct, Judge. They don't mix literally.

Q. (By Mr. Silvers): But their presence together—let's put it that way [662] —is undesirable and you would want to remove the water, isn't that right?

A. Well, it would remove itself. It would run with the gasoline down into your fuel pump, and there is a little glass jar down there, and from time to time you take that off and dump the water out and throw it out.

Q. Well, did you ever hear of a bleeder valve that performed that same purpose that is used to remove condensed water inside a gas tank?

A. Well, I can only repeat that it is very poor practice to have such a valve installed, and it is distinctly prohibited by NFPA regulations and the Coast Guard regulations.

(Testimony of George Washburn.)

Q. What particular regulation are you referring to that prohibits this kind of valve installation?

A. I have got one in my pocket here. These are the fire protection standards for motor craft put out by NSTA.

Q. May I see what you are referring to, Mr. Washburne? Are you referring to this section which you or someone has marked in the margin?

A. No. If you want the precise thing there, we will have to go through here and find it.

Q. I would like you to find me the regulation which prohibits the use of a bleeder valve——

A. (Interposing): Okay.

Q. ——where it was on this particular gas [663] tank. A. You will find it on page 302-11.

Q. Would you show it to me?

The Court: Read what it says there.

The Witness: "Outlet for drawing gasoline below deck for any purpose shall be prohibited."

Q. (By Mr. Silvers): Does it say anything about outlet for drawing water below deck shall be prohibited? A. No.

Q. Do you know whether or not this particular valve was used to draw gasoline off below deck?

A. It is connected with the gas tank, so I assume it's going to draw out the contents of the tank.

Q. And it is on that assumption that you think this valve would draw out the contents of the tank that you concluded it was poor practice, right?

A. That's right.

Q. And that is the only basis?

(Testimony of George Washburn.)

The Court: What is the Coast Guard regulation?

The Witness: I don't have that here. I would have to dig that out.

Q. (By Mr. Silvers): Let's see that book again, please. This is not any Coast Guard regulations you are referring to? A. No. [664]

Mr. Silvers: May I have this marked for identification, your Honor?

(Regulation referred to above marked Respondent's Exhibit W for identification.)

The Court: You had better put on the record what it is now.

Mr. Silvers: Yes, your Honor. For the record, the pamphlet that I have just referred to is entitled "Fire Protection Standards for Motor Craft, National Fire Protection Association.

Q. (By Mr. Silvers): And the page, I think, you have referred to was——

A. In the upper right-hand corner, isn't it?

Q. Page number 302—is this it, Mr. Washburne?

A. No. Pardon me a moment. It is 302-11.

Q. 302-11. Subparagraph 321-C, is that correct?

A. That is right.

Q. You don't hold yourself out as a marine surveyor, of course, in any way, do you?

A. No, sir.

Q. Did I understand you correctly, Mr. Washburne, that the wires in the hose in Respondent

(Testimony of George Washburn.)

Union Oil's Exhibit F were theoretically designed to serve the purpose of a bonding agent, but that practically they don't serve such a function?

A. They serve such a function, but they are actually [665] unnecessary.

Q. Why is that?

A: That is because this nozzle is designed in such a manner that it's in contact with the tank, and any static that might be created by the flow of gas is grounded to the tank.

Q. And when the nozzle is removed from contact with the tank, would there be any bonding agent present then?

A. Well, it's no longer necessary. You have stopped the flow of gasoline which is creating the static, and then you remove your nozzle and you no longer have the same condition.

Q. So your position is that this wire does not really serve any function in this type of operation?

A. That's right.

Mr. Silvers: We have no further questions of this witness.

The Court: All right, sir, thank you very much. Witness excused.

(Witness excused.)

Mr. Nave: Mr. Byrne.

JOSEPH BYRNE

a witness called by and on behalf of the Respondents, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court? [666]

The Witness: Joseph Byrne—B-y-r-n-e.

Direct Examination

By Mr. Nave:

Q. Mr. Byrne, by whom are you employed?

A. By the Union Oil Company of California.

Q. How long have you been employed by them?

A. Approximately four years.

Q. What is your position with them?

A. I am supervisor of the process department in the Oleum Refinery.

Q. Will you state your chemical education and scientific education?

A. Degree of Bachelor of Arts from Stanford University in physical chemistry, or, rather—correction—physical sciences. Master of Science degree from M.I.T. in chemical engineering practice. Doctor of Science degree from M.I.T. in chemical engineering.

Q. In connection with your education and your training and your work, are you familiar with the behavior of petroleum products? A. Yes, sir.

Q. Doctor Byrne, assuming that you have a gasoline tank that's approximate dimensions are four

(Testimony of Joseph Byrne.)

feet by two feet by six inches; it is on a fishing boat, under the deck of the boat with the filling hole up to the deck level; and assuming [667] that the gasoline tank in question is suspended by hangers underneath the upper deck as indicated in the sketch prepared by Captain Hanson, who is a marine surveyor, and introduced in evidence as Respondent's Exhibit S—you may refer to that sketch.

Now, assuming that gasoline was introduced into the spout of the fill neck of that tank by a hose, a level-type, spring-type hose similar to the one I have in my hand, which is marked Respondent's Exhibit J.

I will ask you first, Doctor: What would happen, assuming that the gasoline tank was normal, when any amount in excess of its capacity had been put into the filling tank.

A. We would find the gasoline burbling back on top of the deck, spilling on the deck.

Q. Now, assuming that the gasoline tank in question would hold 30 gallons of gasoline, can you tell me, sir, how much 30 gallons of gasoline would weigh?

The Court: Well, why don't we ask him this? Do you mind if I do it? I was just about to ask him this question.

Mr. Nave: Go right ahead, your Honor.

The Court: Taking these figures shown on the second page of Exhibit S to be so, and that the size of the tank—got a pencil, Doctor?

The Witness: Yes. [668]

(Testimony of Joseph Byrne.)

The Court: —was 48 inches long, 24 inches wide and—I don't know what this is—six feet eight inches, but it can't be that.

Mr. Nave: It is six inches and eight inches.

The Court: Well, let's put seven inches.

What is the cubic content of such a tank, sir?

The Witness: Seven inches deep for this purpose?

The Court: Seven inches deep. We will take seven inches. That is the mean between six and eight.

The Witness: That would be 35 gallons capacity.

The Court: 35 gallons capacity. Now, tell me, what is the cubic capacity of one gallon?

The Witness: In cubic feet, sir?

The Court: Yes, cubic feet or cubic inches.

The Witness: 231 cubic inches for one gallon.

The Court: 231 cubic inches equals one gallon? Is that right?

The Witness: Right.

The Court: And you estimate a tank of these dimensions, 48 inches by 24 inches by seven inches, is 35 gallons?

The Witness: Yes, sir.

The Court: Now, would you compute it on this basis: 48 inches times 6 inches times 24 inches and tell me what would be the capacity in gallons of such a tank? [669]

The Witness: 48 inches by—

The Court: 48 by 6 by 24.

(Testimony of Joseph Byrne.)

The Witness: That would be a 30-gallon tank, sir.

The Court: That would be a 30-gallon.

Now, so that we can have it on the other end of the spectrum, 28 by 48 by 8.

The Witness: That is 40 gallons, sir.

The Court: 40 gallons? All right.

Q. (By Mr. Nave): Doctor Byrne, assuming first, if you will, that a gasoline tank is filled with 30 gallons of gasoline, will you please tell the Court what the weight of the gasoline itself is in the 30-gallon capacity tank?

A. About 175 pounds of gasoline.

Q. And if you will be good enough to make the same computation on 35 gallons, the weight?

A. 205 pounds.

Q. And 40 gallons, what would it weigh?

A. 235 pounds, roughly.

The Court: Is that a circular slide rule you have there?

The Witness: Yes.

The Court: I never saw one like that. Have they been out long?

The Witness: Yes, sir, I bought this one during [670] the war when I couldn't buy the standard kind.

Q. (By Mr. Nave): Now, Doctor, assuming that you are filling a gasoline tank of from 30 to 40 gallon capacity, in that range, depending on the difference of whether it was six inches deep down to eight inches deep; and assuming that you were

(Testimony of Joseph Byrne.)

introducing gasoline into the opening of the gasoline tank that we have discussed by the means of a gravity type hose connected to a gasoline tank upon the dock.

Assuming that that was from 9 to 12 feet above the deck of the ship where the fuel nozzle had been inserted into the opening of the tank; what would be the amount of pressure that would be generated, shall we say, when you are introducing fuel from this fuel line into a tank with an opening in a nozzle of five-eighths inch in diameter? What would be the original impact or pounds that would be introduced into a tank, assuming the tank were empty at that time?

A. It would depend, sir, on the rate at which the fuel was entering the tank.

Q. Assuming that the fuel was entering the tank at approximately five gallons per minute.

The Court: I don't know that there is any such basis for such assumption.

Mr. Silvers: I am going to object on the specific grounds that this assumes something not in evidence. [671]

The Court: That would be almost like a Niagara Falls, you know; and I don't know that the Professor can give us his opinion unless he knows how much is in the tank from which the supply is being drawn, and he knows the cubic content of that tank so that he can measure the weight behind the flow.

Is that correct, Doctor?

The Witness: No, sir. I believe the conditions

(Testimony of Joseph Byrne.)

existing upstream of that valve would not enter into my interpretation of the question as I understood it, but would depend on the rate and volume coming out of the end of this nozzle impacting against the bottom of the tank.

In this case we are assuming the tank on board the ship is empty.

Mr. Nave: Yes.

Mr. Silvers: I will enter an objection, your Honor, on the ground that——

The Court (Interposing): Well, it is entirely hypothetical. It may be illuminating, I don't know. I am not going to give very much weight to this, but figure it out and tell us about it.

The Witness: There are a number of assumptions that go into a calculation of this kind.

The Court: Tell us what those assumptions are. First, tell us whether or not those assumptions have variables. [672]

The Witness: It depends on the area at the bottom of the tank on which this gasoline is impinging. If I could draw an analogy, if I have a pointed object that I hit against with this paper, I would have a great deal of stress. If it's a blunt object, the stress is spread out and no great stress is imposed on the paper.

In this case, for this rough kind of assumption, I would assume that the gasoline is hitting the bottom of the tank in a diameter equivalent to the filling nozzle of the tank.

The Court: That is quite a large assumption to

(Testimony of Joseph Byrne.)

use, because when water leaves the confinement of a nozzle, the natural force of nature is to spread it out.

The Witness: Yes, sir, it has a tendency to spread out. The farther it spreads out, the less the pressure is.

The Court: And the greater the fall, the greater the tendency to disperse.

The Witness: Yes, that's correct, your Honor.

The Court: So you are making quite a rash assumption when you assume the stream remains constant.

The Witness: Yes, sir.

The Court: It is an assumption opposed to physical facts, physical laws.

The Witness: There is a confining influence of the neck of the—— [673]

The Court (Interposing): I say that is an assumption which is opposed to the laws of nature, isn't it?

Mr. Nave: Well, what I was about——

The Court: Wait a minute. We might as well get this.

Mr. Nave: Well, what I was after——

(Simultaneous colloquy between Court and counsel.)

Mr. Nave: Well, perhaps my question was not artfully stated, your Honor. I think the fault is on my part in the way I stated it.

The Court: All right. The Court may also fail

(Testimony of Joseph Byrne.)

to follow the witness in his desire to be an accommodating witness.

Q. (By Mr. Nave): What I am trying to ascertain from you, if you can give me the answer, I am trying to find out what would be the pressure that would come through the operation of a 5-inch nozzle to go into a tank such as we have described here, in a gasoline installation, gravity flow, and assuming that the gasoline would go into that tank and not exceeding five pounds—(one word inaudible to the reporter).

Mr. Silvers: Same objection.

The Court: Overruled.

The Witness: In this sort of case, making a rash assumption that represents the extreme limits of the boundary that physical facts will allow, on the order of one pound per [674] square inch.

Q. (By Mr. Nave): That would be the maximum, perhaps?

A. As physical laws take over and allow the spreading to occur, the pressure will be less.

Q. Thank you very much. Now, assuming, Doctor, going one step further, assuming your tank is filled up to the outlet and that additional gasoline is introduced into the neck of the fill pipe; and assuming the same rate of not to exceed five gallons per minute and the same nozzle, the same conditions there as the tank above, could you tell me the maximum additional pressure that is being asserted in the fill when the fuel has come to the top of the fill neck?

(Testimony of Joseph Byrne.)

Mr. Silvers: My previous objection, your Honor.

The Court: Overruled.

The Witness: That question is not clear to me, sir, whether you want to consider the gasoline still flowing, or whether you want to consider the gasoline stationary.

Q. (By Mr. Nave): Consider the gasoline is still flowing and that you have reached a point where your tank is filled and you are still introducing gasoline by your nozzle into the fill pipe.

A. Under the worst of the assumptions I could make, we would again have a pressure of about one pound per square inch. [675]

Q. That would be maximum pressure?

A. Yes, sir.

Q. Now, assuming, Doctor Byrne, that a gasoline tank ruptured or failed when its capacity was from 30 to 40 gallons, under the fueling conditions that I have stated in my previous question, by use of this type of hose nozzle and this type of neck with a gravity feed tank, making this assumption that such tank did rupture or fail, could you state, if you have an opinion as to what part of that tank would be inclined to rupture or fail and the reasons for it?

Mr. Silvers: Same objection.

The Court: I am most interested in hearing this answer. The objection will be overruled.

I would like to know how the Doctor can answer that unless he knows something about the relative differences in the sides and how the sides are put together, and the material with which it was made.

(Testimony of Joseph Byrne.)

Q. (By Mr. Nave): You may refer to this sketch, Doctor Byrne, as to the installation of the tank and the use of hangers.

The Witness: I don't believe there is——

The Court (Interposing): There is no description of the hanger in these sketches. There is no description of what this tank is made of, no description of the gauge of the tank, no description as to whether it is welded, whether there [676] are partitions inside that break up the space or not.

Mr. Nave: Well, the only thing I can do——

The Court (Interposing): Maybe the Doctor can answer the question.

Mr. Nave: Well I will assume for this question that the tank is made of galvanized metal, and I will assume that the tank is the standard gasoline tank of its size as to the thickness of the galvanized metal used.

The Court: I don't know that there is any standard of thickness gauge, particularly in recent years.

Mr. Nave: Well, then we will withdraw those questions until Captain Hanson has testified about them.

The Court: Well, if you have the information that you can give the witness, give it to him, or if he can answer it without that information, I would be interested in hearing it.

Can you answer that question, Doctor, that counsel propounded to you?

The Witness: Not without making a number of additional assumptions, your Honor.

(Testimony of Joseph Byrne.)

Q. (By Mr. Nave): Doctor, gasoline is—I don't think there is any question about it—is a volatile liquid. It will vaporize. Now, when gasoline is played into an area or allowed to escape in an area where there is air, it will make a vapor, that is true, isn't it? A. Yes, sir. [677]

Q. And that vapor would reach a certain percentage of saturation of gasoline fumes to air?

Mr. Silvers: I object to the question as leading and suggestive.

The Court: Well, it is almost common knowledge so far. We know that gasoline vaporizes.

Mr. Silvers: Not that part of it, but that concentration business he is making there.

The Court: All right, go ahead and finish your question.

Q. (By Mr. Nave): What I meant to ask you, Doctor, in order to save time, what range, what percentage of mixture of gasoline or gasoline vapors would form a flammable range of gasoline?

A. The rule of thumb that we use for petroleum work is one per cent at the lower flammable limits, seven per cent in the upper flammable limits.

Q. And is there a range between one per cent and seven per cent that would be considered as being severely explosive?

A. In the center of the range, on the order of three or four per cent, when the vapor is confined, would cause the greatest damage in case of ignition.

Q. Now, assuming, Doctor, that you have an

(Testimony of Joseph Byrne.)

engine room on a fishing boat and that the engine room is approximately 30 feet long, 20 feet wide and 8 inches high—— [678]

Mr. Vartan: You mean 8 feet high, don't you?

Mr. Nave: 8 feet high, thank you.

Q. (By Mr. Nave): 30 feet long, 20 feet wide and 8 feet high. And assuming that gasoline is introduced into that room and permitted to spill or fall on the floor of the engine room of the size that I have described; and assuming that you had a warm temperature inside the room of, assuming 70 degrees temperature in the engine room; and assuming that in that engine room there was equipment and apparatus that took up a part of the space so that actually you had an equivalent of 1,200 cubic feet of space that vapors could fill in and spread over.

I will ask you to state, if you will, please, the length of time it would take for these gasoline vapors to come to the concentrations in the flammable range of one to seven per cent.

Mr. Silvers: We will object to the question, your Honor, on the ground that it assumes something not in evidence, facts not in evidence; that it is remote and speculative; that it omits one, I think, obviously material factor and that is the nature of the ventilation that is present in the room.

The Court: I would like to see if the Doctor can answer that. I would like to see what advances modern science has made in the realm of speculation, and therefore the objection is overruled. [679]

The Witness: I am confused at this moment, sir,

(Testimony of Joseph Byrne.)

on the last part of the question. Let me have the question?

The Court: Can you tell the rate at which gasoline can evaporate unless you know the temperature at which it is exposed?

The Witness: I was given a temperature to assume but was not given the area over which it was spread or some of the other factors that would affect it.

Mr. Nave: All right, I will restate the question.

Q. (By Mr. Nave): Assuming you have an engine room of 20 feet by 30 feet by 8 feet; and assuming that the temperature in that engine room is around 70 degrees; and assuming that the part of that space that is not occupied by tanks, engines and other apparatus, or the free space is approximately 1,200 cubic feet; and assuming that the ventilation would consist of a hatchway from the top of the engine room of approximately two feet by two feet and a ventilator in the engine room of approximately 12 inches in diameter.

Now, can you give me a calculation based on that as to the behavior of formation of vapor in that area under those conditions?

Mr. Silvers: Renew our objection on the grounds previously stated.

The Court: Same ruling. Overruled. [680]

The Witness: To determine the rate at which the vapors would spread in a space like that is not a matter that I can put in calculation. In my judgment, it would be a matter of minutes for the vapors

(Testimony of Joseph Byrne.)

to go through that compartment. There is no equation of science that I can spell out.

Q. (By Mr. Nave): All right. From the standpoint of time, of minutes, can you give me an estimate of the length of time it would take for vapors to form a flammable range or combustible range?

A. That would depend, sir, on the amount of gasoline that had been introduced.

Q. Well, let's assume that 58 gallons of gas had been introduced into that area, could you tell me what would happen in the way of formation of vapors?

Mr. Silvers: We object to the question, your Honor, on the ground it assumes facts not in evidence.

The Court: Overruled.

The Witness: In a case like that, again there is no equation that tells us how long we will get into an explosive range, but in my judgment it would be a matter of a very few minutes until an explosive mixture was reached or arrived at.

Q. (By Mr. Nave): Now, gasoline that is introduced into an area such as we have described here, does it tend to rise or does it [681] tend to settle?

A. It tends to settle.

Q. And that is due to the fact that it is heavier than air, is that true?

A. Yes, the vapors are heavier than air.

Q. And assuming that you introduce one gallon of liquid fuel, what percentage of vapor would be produced under the conditions—no turbulence, or

(Testimony of Joseph Byrne.)

little turbulence, and around 70 degrees temperature?

A. The initial evaporation of the gasoline would be rapid until about something on the order of ten per cent of it had evaporated, and then the rest of the evaporation would become progressively slower. It would be a matter of hours for all of the gasoline to evaporate.

Q. Assuming an area in an engine room such as I have described of 1,200 cubic feet of free space, how much gasoline would have to be introduced in that area before you would have a combustible material of from one to seven per cent?

Mr. Silvers: We will still object to it, your Honor, on the ground that it is apparent there is no basis on which this witness can answer the question.

The Court: If he can't, I have enough faith in his integrity for him to so advise the Court. Overruled.

The Witness: Again on the basis of the initial ten per cent evaporation rapidity that we are concerned with, [682] we would need about four gallons of fuel introduced into that compartment to create a minimum flammable mixture.

Q. (By Mr. Nave): Now, assume, Doctor Byrne—first let me ask you, have you had any experience, made any study, of the toxic effect of gasoline fumes or vapor on people who are exposed to such fumes?

A. I have not made any direct study, sir, but knowing of such figures is part of my business.

(Testimony of Joseph Byrne.)

The Court: How is that material in this case?

Mr. Nave: This goes, your Honor, to the theory as to the vapor, and the theory that if there had been gasoline spilled on the deck, as to how it would manifest itself on the people who were in the area.

The Court: In the open area, unconfined area?

Go ahead, if you can answer it. I am interested. In the open air? It is quite common knowledge that fumes dissipate in the open air, particularly around the waterfront where there are currents of air. But go ahead. I am finding some of these answers most informative.

Q. (By Mr. Nave): Now, Doctor, assuming and making the assumption that gasoline had been spilled or liberated up in an area on the dock shown here in this photograph, Respondent's Exhibit B, and that a large quantity of gasoline was released or permitted to flow in that area; and assuming that a man is standing in [683] the immediate area where the gasoline in large quantities, anywhere from 30 to 60 gallons of gasoline, had been permitted to concentrate in the area, would such gasoline create a smell that would be discernible by a person by his own nose? A. Yes, sir.

The Court: Doesn't constant contact with such fumes dull the sensitivity of the olfactory nerves?

The Witness: Yes, sir, it does.

The Court: And one constantly around gasoline or gasoline products is not as sensitive to it under ordinary circumstances as one who is a stranger to

(Testimony of Joseph Byrne.)

those fumes? Would you say that that is the result of your experience?

The Witness: In my experience that is true, yes, sir.

The Court: In other words, you being around gasoline might not smell the fumes as quickly as I. I can only smell it when I am paying 37 cents a gallon and find it going out of the spout.

The Witness: I agree. I am even critical to that point, your Honor.

The Court: All right.

Q. (By Mr. Nave): Well, assuming a large quantity of gasoline were released in an area where a man was standing and there was a sufficient—it formed sufficient vapor where it could [684] explode with a flash, would that person be able to remain in that area in that vapor without becoming violently ill, having it affect his entire system?

A. The minimum flammable limitation we were using is one per cent, which is equivalent in toxicology to 10,000 parts per million. That is rated at a concentration where a few lungful will cause severe symptoms, in some cases even unconsciousness, after a few lungful at that concentration. If a man had been standing in it, even if his olfactory senses were completely dulled, he would have had other symptoms from it—dizziness, probably vomiting.

Mr. Nave: Thank you. You may examine.

Mr. Silvers: No questions.

Mr. Vartan: No questions.

The Court: Thank you. Witness excused.

(Witness excused.)

The Court: Any other witnesses?

Mr. Nave: No.

The Court: Respondent Union rests?

Mr. Nave: So far as testimony of any witnesses, your Honor, we do. There may be some exhibits offered. Not verbal testimony at this stage. We have introduced the witnesses that we indicated to your Honor.

Mr. Vartan: Mr. Silvers, can I interrupt?

Mr. Silvers: Certainly. [685]

Mr. Vartan: On the question of the value of the franc, Mr. Nave and Mr. Silvers have stipulated to 350 francs per dollar, just for the record.

The Court: That is on the claim of the deceased?

Mr. Vartan: Yes, your Honor.

The Court: And that is to be applied to the testimony taken on the commission of the widow?

Mr. Vartan: That is right.

Mr. Nave: Your Honor, in that respect I am in no position to dispute the computation, but I can't stipulate to it. I don't know myself.

The Court: But you will stipulate that if he called the exchange expert, that the exchange expert would testify at the time involved the Algerian franc was on an exchange rate of 350 to one American dollar?

Mr. Nave: That such a statement would be if such witness could be produced, your Honor.

Mr. Vartan: I don't want to mislead the Court,

your Honor. Mr. Belleci, whose sister-in-law is still living, the widow, he stated that that was the exchange at that time, because these boys are constantly sending money home. I don't want to mislead you that I have checked any expert.

The Court: You can get a quotation from any financial paper around that time and I will receive it, but I will take this stipulation. [686]

Mr. Vartan: Very well.

Mr. Silvers: Your Honor, at the outset we would like to place on the record the agreement and stipulation of counsel with regard to certain allegations of the libel in action No. 27364 brought by Idalene J. and Frances E. Cardinale.

The Court: That is the suit which you have filed on recovery of hull damage to your ship?

Mr. Silvers: That is correct.

The Court: You have filed that as a cross-libel against Union Oil?

Mr. Silvers: No, it was in a separate action.

The Court: A separate action against Union Oil?

Mr. Silvers: Against Union Oil, right.

The Court: All right.

Mr. Silvers: In that connection I would like the stipulation noted that at the time we are interested in, September 28, 1954, the date of this fire and explosion, Libelant Idalene J. Cardinale was a half owner of the Diesel fishing vessel Santa Lucia, Official Registry No. 236703, and that Frank J. Cardinale was the owner of the other one-half interest in the same vessel;

That Libelant Frances E. Cardinale, the widow of Frank J. Cardinale, was appointed and duly qualified as Administratrix of the Estate of Frank J. Cardinale on November 2, 1954, in probate proceeding No. 13407 in the Superior Court [687] of Monterey County, State of California.

Mr. Nave: I will stipulate to those matters, your Honor.

Mr. Silvers: Further, that the Santa Lucia referred to was a wooden purse seiner, 72.8 feet in length and 20.5 feet in breadth, 9.6 feet in depth, with a gross tonnage of 109, net tonnage of 69.

The Court: Have you filed the stipulation you are reading from?

Mr. Silvers: Sir?

The Court: Have you filed the stipulation you are reading from?

Mr. Silvers: No, I am reading from certain of the allegations of the libel, which I understand are not being contested.

The Court: Well, you filed an answer, did you not? The Respondent Union filed an answer to this libel?

Mr. Nave: Yes, your Honor.

The Court: Why are you reading this? These are admitted by the pleadings.

Mr. Silvers: The issues were raised by the plaintiff because they denied these allegations.

Mr. Nave: We have no knowledge of this.

The Court: Now, you are withdrawing your denial? All right, go ahead. [688]

Mr. Silvers: That is the extent of the stipulation I would like entered at this time, your Honor.

Mr. Nave: I have stipulated as to the ownership.

The Court: As to ownership, as to the issuance of letters of administration, as to the size and weight and tonnage of the ship.

Mr. Nave: I have no information on that, your Honor.

The Court: Well, all right, there is enough information on it already in the case. We have a surveyor's report, haven't we?

Mr. Silvers: I think it is set out there, your Honor. I believe it is a part of the exhibit of the Union Oil Company.

The Court: Those statements are in there.

Mr. Silvers: We would like to call Captain Hansen, as Libelant's next witness.

The Court: All right. Come up, Captain.

IRVIN HANSEN

called as a witness on behalf of the Libelants, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Irvin Hansen. [689]

Direct Examination

By Mr. Silvers:

Q. You are known as Captain Hansen, sir?

A. Yes.

(Testimony of Irvin Hansen.)

Q. What is your occupation at the present time?

A. Marine surveyor, San Francisco.

Q. How long have you been a marine surveyor, Captain? A. Since 1939.

Q. And will you describe briefly what your work as a marine surveyor in that period of time includes?

A. From 1936 to 1939 I was connected with the Bureau of Marine Inspection and Navigation, as outside inspector of new construction and damaged hulls. After 1939 I became a general and marine surveyor, and during this time——

Q. (Interposing): Excuse me just a second. Let me interrupt. In order to perform the work you have just described as marine inspection work from 1936 to 1939, was it necessary to have qualifications equivalent to a master's certificate?

A. It was.

Q. Would you continue, please?

A. In 1939, why, I went into the marine surveying business with Captain Genereaux, who had been in that same business for the past 30 years, and during this time, 1939 up to the present time, we represent American President Lines, Pacific Far East, General Steam, Balfour Guthrie, in handling their ships, loading and discharging, general cargo, et cetera. [690]

Also, we are the underwriters on salvage work, engines and hull work.

Q. And that work includes, I take it, the constant examination, inspection and evaluation of the

(Testimony of Irvin Hansen.)

condition of various types of marine vessels, is that correct? A. It does.

Q. And do you also engage in activities relating to the salvage work in connection with marine vessels? A. Yes.

Q. Have you been in the past a member of the regular United States Navy? A. I have.

Q. For how many years were you in the regular United States Navy? A. 21 years.

Q. Were you retired in 19——?

A. 1936.

Q. 1936? And that was the rank, retired rank, of full lieutenant? A. Yes.

Q. During your naval experience—did you say 21 years naval experience? A. Yes.

Q. In the regular Navy; did that include experience and training in all phases of nautical construction and operation? [691]

A. Included engineering, navigation, Diesel engines, submarines, aviation, construction, repair, communications, hydrography.

Q. On the average, approximately how many vessels do you examine, inspect and survey each year?

A. About 150 of the large offshore vessels and probably about three or four hundred of the harbor-based, inside vessels like tugs and barges and yachts, fishing vessels.

Q. More specifically, would you tell the Court what has been your experience in terms of numbers in relation to purse-seiners of the type of the Santa

(Testimony of Irvin Hansen.)

Lucia, the vessel that we are concerned with here? About how many vessels of that type have you examined, inspected and evaluated?

A. Well, at one time we had about a hundred and fifty purse-seiners, and I represented the underwriters of San Francisco and Tacoma, Washington, and B. K. McDonald out of Seattle, and there's one other—I can't think of his name—up there. Quite a few. They had practically insured all the fishing vessels in Monterey and San Francisco at that time, between 130 and about a hundred and fifty of them, purse-seiners and tune-up boats.

Q. And more specifically with respect to the DFV Santa Lucia, had you on a number of occasions prior to September of 1954 made inspection and surveys of that particular vessel?

A. Quite a number of them. [692]

Q. Stretching back approximately how many years?

A. Well, see, most of those purse-seiners were taken over by the government during the war, and as soon as the war was over, why, we represented the owners in reconditioning them in accordance with the stipulated amount of money that the government had appropriated for the reconditioning process.

Sometimes it didn't meet all of it, but they got a fair share. It was on a percentage basis. And then from that time on, why, I was on it every year.

Q. I see. Now, calling your attention to a report of survey which your office made of this particular

(Testimony of Irvin Hansen.)

vessel, the report being dated September 10, 1954, and the date of the inspection September 3rd, 1954, and which is in evidence as Respondent's Exhibit V——

Mr. Silvers: Would you like to retain that, your Honor?

Q. (By Mr. Silvers, continuing): ——you made an inspection on September 3rd of the vessel Santa Lucia, did you not, Captain?

A. Yes, I did.

Q. Did you make another inspection of this vessel on the very afternoon of the explosion, September 28, 1954? A. I did.

Q. Was that approximately an hour and a half before the [693] explosion took place?

A. Well, I don't know the exact time, but it was very close to an hour and a half or two hours, because they were just finishing discharging their fish and were going right over to the Union Oil dock.

Q. You left just before the vessel cleared the fishing dock?

A. Yes, where they were unloading their anchovies.

Q. I see. Now, the exhibit I refer to indicates certain recommendations which you made when you completed your marine survey on September 3rd, 1954; and I am calling your attention to the second page, to the six items which are set out therein.

They read:

“Install a bilge electric alarm. Weigh and fill all

(Testimony of Irvin Hansen.)

CO₂ fire-extinguishing equipment. Thoroughly clean the entire engine room and bilge area. Repair or renew if necessary all electrical outlets and wiring now hanging adrift. Completely overhaul pyrometer, wiring, and thermal couples. Renew union on falling sea suction line, port side."

On September 28, 1954, had those recommendations been satisfied?

Mr. Nave: I object to that, if the Court please, calling for a conclusion of the witness.

Mr. Silvers: I will withdraw that. [694]

Q. (By Mr. Silvers): Preliminarily, with respect to the inspection you made on the afternoon of September 28, 1954, I would like to ask you this: Did you at that time make a complete inspection of the vessel?

Mr. Nave: I object to that, if the Court please.

The Court: Overruled.

Q. (By Mr. Silvers): You may answer the question.

The Court: Did you go aboard the vessel?

Q. (By Mr. Silvers): Did you inspect the vessel?
A. I did.

The Court: All right. Now, tell us what you did, what you saw and what you found.

The Witness: From the time I first made the original inspection, these recommendations were——

The Court: Just a minute. You went on the ship, did you?

The Witness: Yes, sir.

(Testimony of Irvin Hansen.)

The Court: Tell us how you boarded it, what you saw on the ship, what you observed.

The Witness: I went on the ship again down to San Luis Obispo port. I think the name of the town is Avila. I went there for reinspection to see whether these recommendations [695] had been carried out, and I checked each one individually all the way through, and they had been carried out, except that bilge alarm, and that hadn't been installed.

Q. (By Mr. Silvers): Did you on the afternoon of September 28, 1954, make an inspection of the deckhouse, including the crew's quarters and galley area? A. I did.

Q. Did you find—withdraw that.

What were the results of your inspection, first of the galley area? A. Just what do you mean?

Q. Well, did you find anything in any way out of order or, in your opinion, in condition which should be remedied or changed?

Mr. Nave: If the Court please, I object to the question's form.

The Court: Objection sustained.

Q. (By Mr. Silvers): What did you observe about the condition of the galley, Captain, in your inspection on the afternoon of September 28, 1954?

A. It was an ordinary galley for a fishing boat. Wasn't anything wrong with the galley. That is the least part of the vessel that you pay too much attention to. [696]

Q. What did you observe about the gasoline

(Testimony of Irvin Hansen.)

tank and the pipe from the gasoline tank down to the auxiliary tank?

A. The gasoline tank, your Honor, is down in the——

Mr. Silvers: I was coming to that.

The Court: Let's come to it right away.

Mr. Silvers: Well, I thought your Honor was also interested in the galley stove.

The Court: Well, let's get it down to this tank.

Mr. Silvers: Let's go down to the engine room.

Q. Will you tell us where the auxiliary gas tank was located?

A. On the port side of the engine room, directly over one of the Diesel tanks, and it hung by straps to beams of the deck.

Q. Is that a standard type installation that you had observed on all the hundreds of purse-seiners that you have inspected and examined through the years?

A. Most of them, yes.

Q. Is there any hazard or danger, in your opinion, in locating an auxiliary gas tank in that position?

A. No, there isn't.

Q. Describe the fittings and the pipes and connections that led from that auxiliary gas tank.

A. It was copper pipe and goes off forward——

Q. Keep your voice up a bit. [697]

A. It is a copper pipe that led from the forward end of the gasoline tank, and then that copper pipe extended forward for about eight or nine feet where there was a Y-connection placed in the pipe in order to take a lead from the Y down to the gasoline-

(Testimony of Irvin Hansen.)

powered generator, and another lead extending farther forward to the gasoline-powered four-inch pump.

Q. Was there any other connection? Was there a bleeder valve in that gasoline tank?

A. There was a bleeder valve at the after end at the bottom of the gasoline tank.

Q. Describe that for us and tell us what its function was.

A. This was a small globe valve that was connected by a union to the bottom of the tank and was generally used to drain off the water that may have accumulated in the gasoline tank.

Q. Is that a standard type of installation aboard this type of vessel?

A. We consider it a standard type in order to avoid water getting into the carburetors or either of the gasoline engines.

Q. What would be the manner in which that valve would be used and operated to perform the function you describe?

A. Generally it's a little open one-quart can, and I went down there and just cracked the valve to see if there was any water, because the water is always in the bottom of the tank [698] and the gas on top. And as soon as we saw, maybe there was half a cup of gasoline was coming out, and we just closed the valve off and that was the end of it.

Q. Is there any hazard or danger of any kind, in your expert opinion, to the installation of a bleeder valve in that way and manner and condi-

(Testimony of Irvin Hansen.)

tion that you have described as you saw it on the Santa Lucia? A. No, not at all.

Q. Did you make a specific inspection of the gas tank and of the piping and connections leading from it on the afternoon of December 28, 1954?

A. I did.

Q. Describe the detail of your inspection and what you observed at that time.

A. I crawled up on top of the fuel oil tank and then ran my hand over the top of the gas tank to see if there was any oily rags or anything else up there.

Q. Were there any?

A. No. Then I put my fingers down under the bleeder valve to see if I could get any smell of gasoline off that, which there weren't.

Then I went down below where we had the valves to the auxiliary generator and the valve over to the Wisconsin pump, and rubbed my fingers over that valve. Sometimes you get a small formation of gas there, but there weren't any, so I [699] considered the valve in good shape.

Q. Of what material was that tank made, according to your best recollection?

A. Well, about 12 or 14-gauge galvanized metal.

Q. Did it then, after your inspection of it, appear to be entirely tight, sound and secure in all respects?

A. Yes, it did. I had seen it for about eight or ten years.

Q. Did you examine all of the power switches

(Testimony of Irvin Hansen.)

and wires aboard the Santa Lucia on the afternoon of September 28, 1954?

A. I checked all the wiring and everything that was on these recommendations to be done.

Q. Describe the condition of that portion of the ship, the wires, switches, electrical connections.

A. Well, all these purse-seiners have a main switchboard in the engine room, and of course all wires are fused to this switchboard, and all you do is go behind the switchboard to see if the wires are all connected, if it is all taped up.

On this switchboard you have a master switch and also have an overload switch. That's in case you are using too much power, and the circuit-breaker will throw the current off.

When you first go into the engine room and you want to start the motor, you throw the master switch, and that puts your electricity right up to the board, and then if you wanted to have the lights going into the galley, you throw [700] the switch up there which says "galley lighting" and the cabin, which is forward, the sleeping quarters, you throw that switch, and if you want it down in the engine room, you throw that switch on.

Q. Did all of those switches and connections that you have just described, as you observed them on that afternoon, appear to be in sound and proper condition without defect?

A. They appeared to be satisfactory.

Q. By the way, Captain, was there anything in the—withdraw that.

(Testimony of Irvin Hansen.)

Was this inspection service that you told us about which you performed during the years 1936 to 1939 ultimately transferred and taken over by the Coast Guard, those functions, taken over by the Coast Guard?

A. The Bureau of Marine Inspection and Navigation used to be called the old Steamboat Inspection Service when I first entered it, and then it was changed to the Department of Commerce, and then changed to the Bureau of Marine Inspection and Navigation, and just at the time I left it, resigned to go into business for myself, the Coast Guard took it over, and now it is controlled by the Coast Guard.

Q. Is there anything to your knowledge in the Coast Guard regulations which prohibits the kind of bleeder valve that was on the auxiliary tank of the Santa Lucia?

Mr. Nave: I object to that. [701]

The Court: Well, he may be in a position to answer. Objection overruled. Have you discovered any?

The Witness: No, sir, not in the Coast Guard regulations.

The Court: Have you discovered any in any regulations applicable?

The Witness: No. We follow the regulations very closely written by the Bureau of Navigation, the Coast Guard, Naval Officers, and the like.

The Court: Would it be more proper to describe this underneath valve as a pet cock?

The Witness: No, sir, it wouldn't, because a pet

(Testimony of Irvin Hansen.)

cock is a valve that has a little stem on it and you just push it one way or the other and that opens and closes, but a drain valve is a globe valve which has screws to open and close it.

Q. (By Mr. Silvers): How far is the gasoline tank in the engine room overhead which you have described from the galley stove?

A. About 15 or 16 feet, somewhere in that area. It is the full length of the galley and then forward of the engine room bulkhead.

Q. How long was the galley?

A. The galley was about 12 feet from the after end of the galley to the door going into the crew's quarters.

Q. Was the stove against the after bulkhead of the galley? [702]

A. It was.

Q. And is there a bulkhead that divides the galley from the crew's quarters forward?

A. Well, we don't call that a bulkhead. We call a bulkhead a watertight bulkhead like you have down in the engine room.

Q. I am not referring to the watertight bulkhead.

A. There was a bulkhead between the galley and the crew's quarters.

Q. Yes, and the crew's quarters were directly over the engine room, is that correct?

A. That is right.

Q. What kind of an engine was the auxiliary generator?

A. Wisconsin.

(Testimony of Irvin Hansen.)

Q. And what kind of engine with respect to the auxiliary pump? A. That was a Wisconsin.

Q. How were those started?

A. Used a crank like you used to use on an old automobile, like a Ford, right on the forward end of the flywheel, and then you have an interrupted screw, as you call it, and then your crank fits on that and you just turn it over until she goes.

Q. What purpose did the auxiliary generator serve?

A. Well, the auxiliary generator serves the purpose of [703] charging your batteries if and when your main engine fails to sometimes, or when you are in port and not using your main engine and your batteries go down, and you are not going to go to sea, so you want lights on the ship and you use the auxiliary generator to go ahead and charge up. But when you are at sea, you have a generator on the engine which is going, the same as you do on your automobile, and that automatically charges your battery.

The Court: Before the gasoline feed pipe leaves the auxiliary engine, both the auxiliary generator and on the pump there was a valve?

The Witness: Yes, there was a valve on each one and one up on the tank.

The Court: Now, when the auxiliary engine was off, or idle, not running, was it necessary to turn off that valve on the gasoline feed pipe?

The Witness: You always turn off both valves.

The Court: What would be the effect if you

(Testimony of Irvin Hansen.)

stopped running the auxiliary engines and neglected to turn off the feed valve, the valve to the feed pipe?

The Witness: Well, you would have to turn the valve off to stop the engine.

The Court: Is there no other way to stop that engine?

The Witness: Well, it would be very difficult to [704] do it, because it isn't like an automobile engine where you are throwing different power——

The Court: Was there a switch that you could throw off that would interrupt the ignition?

The Witness: Oh, no, sir.

The Court: How many cylinders on this?

The Witness: Two.

The Court: Are you sure there was no switch that interrupted the ignition so that you could turn it off by just switching off the ignition?

The Witness: No, sir. When we started up the auxiliary, we opened up what you would call the valve from below, then go up to the tank and open that valve up and the gasoline would come down in the carburetor, and then you go ahead and use the crank on there and start it up.

The Court: Do I understand if you wanted to turn off one of these auxiliary engines, the only way you could do it would be by shutting off the valve on the feed line?

The Witness: That's the only way I know.

The Court: Well, now, wouldn't the engine con-

(Testimony of Irvin Hansen.)

tinue to run until the gasoline which had accumulated in the carburetor had burned up?

The Witness: Not any more so than the gasoline in your automobile engine. As soon as you turn the switch off, the engine stops. [705]

The Court: Doesn't it stop then because it doesn't get ignition?

The Witness: Yes, sir.

The Court: You tell me there is no way of shutting off the ignition, the only way you can stop your auxiliary engine is by shutting off the supply of gas.

The Witness: Well, you could shut off your ignition by going forward.

The Court: I asked you that before and you told me you couldn't do it.

The Witness: Well, I mean you could go to the board and cut your power off on the board so you would have no electrical power to your spark plugs. But they don't generally use that. They generally close the valves off and that stops it.

The Court: Don't you shut your engine off quicker by shutting off the ignition?

The Witness: Yes, you do, but you have a situation then that would flood your carburetor.

The Court: Never mind that situation. What I want to know is this: If you depend upon the shutting off of a valve to stop the operation of these auxiliary engines, don't the engines continue to operate until all the fluid is out of the carburetor?

The Witness: If you still had your power [706]

(Testimony of Irvin Hansen.)

from the spark plugs you probably could run it for a little while.

The Court: How long would you say?

The Witness: Oh, about two or three minutes.

The Court: As a matter of fact, how these engines shut off is by throwing the switch?

The Witness: Lots of times that is the first thing they generally do is pull the switch and then close the valve.

The Court: Why didn't you tell me that before?

The Witness: Well, maybe I was a little bit confused.

The Court: Now, then, if somebody threw off a switch and stopped running these engines by throwing off the switch and neglected to turn off the valve, what would happen to the flow of gasoline? Would it continue to flow into the carburetor, the gasoline?

The Witness: If the valve was open and the engine was stopped, you would flood your carburetor.

The Court: And after your carburetor flooded, what would happen?

The Witness: You might have an overflow.

The Court: And would it continue to overflow with the force of gravity?

The Witness: That would be a very difficult question to answer, sir, because I have never had that condition [707] to exist.

The Court: Is this a gravity gasoline feed?

The Witness: Yes, sir, it is.

(Testimony of Irvin Hansen.)

The Court: Suppose we take a ten-minute recess.

(Short recess.)

Q. (By Mr. Silvers): Calling your attention to the auxiliary engines and the switch panel in the engine room that the Court was asking you about, did you request Frank Cardinale, who died in the explosion, to perform an operational test of both auxiliary engines while you were making your inspection?

A. I had him start both engines, yes.

Q. Did you actually see him throw the switch and start the engine?

A. Yes, I saw him start the engine, yes. I was standing in front of the main engine and I said, "All right, Frank, start this pump first and we will see how that works," and he started it, and I said, "All right, close it, and start the auxiliary generator." I wanted to see if they would run because they are important parts of the vessel.

The Court: What did he do when he started the engine?

The Witness: I didn't do anything.

The Court: I said, what did he do.

The Witness: He went over and threw the switch [708] that would put the electricity through the spark plugs, and then he opened up the valves on the gasoline tank, and the other valve, and then he got the crank and cranked the engine, and it started up and ran for two or three minutes, and then I said, "Stop it."

(Testimony of Irvin Hansen.)

The Court: What did he do when he stopped it?

The Witness: I can't answer that. I don't know.

The Court: Didn't you watch him as he stopped it?

The Witness: I was standing right within about three or four feet of the engine when he stopped it.

The Court: I said, did you watch him as he stopped it?

The Witness: Yes, I saw him.

The Court: What did you see him do?

The Witness: All I saw him do was to turn the valve off that let the gasoline down to the auxiliary engine.

Q. (By Mr. Silvers): Did you actually see him turn the valves off? A. Yes.

The Court: Did you see him go to the switch valves at all?

The Witness: No, because he was going to start the other engine.

The Court: Are both engines on a separate switch?

The Witness: I think both engines, both of [709] those engines are connected up to the board on one switch so that you throw that switch and then you put the power to both of them.

The Court: Are you sure of that?

The Witness: No, sir, I am not sure of it.

The Court: Would that be good seamanship instruction?

The Witness: Yes, sir, I think it would be good,

(Testimony of Irvin Hansen.)

because when either one of them run, you wouldn't want separate lines just to two engines. I have never seen it that way.

The Court: That would be if you wanted to have the generator running and the pump turned off, you couldn't turn the pump off right away, could you? You could only turn it off by shutting off the supply of gasoline, isn't that right?

The Witness: If there was just one line that went down there, that would be a fact.

The Court: Are you sure there was one line, one electric line, to both engines?

The Witness: No, sir I am not.

The Court: There is one more question I would like to ask you: There is some testimony in this case that prior to coming in and docking at the dock for gasoline, the men went out and washed off the decks and washed off the remaining debris left aboard the ship from the fish; and there is some testimony that they washed up, too, washed their hands and faces to clean up a bit. [710]

Now, what is the procedure followed when you are flushing the decks to get rid of the remains of fish?

The Witness: They have a connection up on deck, and they can run two pumps if they want. They have one four-inch centrifugal pump that, if they are running the main engine, they can connect that pump and that brings water up to the deck, and they have a hose there that they can connect

(Testimony of Irvin Hansen.)

up, and then they go down in the fish hold and wash the fish hold out and then pump it overboard.

Or, if the engine is stopped, they can go down and start the auxiliary pump, the Wisconsin pump, and that will take sea water and pump it up on deck through the hose and down into the fish hold.

The Court: So that if they are flushing out the hold, flushing off the ship, and the engine is turned off, they use the pump?

The Witness: They would use the auxiliary pumps then.

The Court: And how would they ordinarily wash their hands?

The Witness: Well, you see, that is a fresh water pump. They had two of them, one for what they called the service pump that went to the toilet, and those were what they call Fairbanks Morse pressure pumps.

The Court: Were they manually [711] operated?

The Witness: No, sir, they are operated by a little motor.

The Court: Another motor?

The Witness: Yes.

The Court: With another engine?

The Witness: No, sir, no engine, just a motor.

The Court: An electric motor?

The Witness: An electric motor, yes. Just throw the switch on the board where it says, "Service pump," and that runs under compression.

The Court: Where was that motor located?

(Testimony of Irvin Hansen.)

The Witness: Well, that was located at the after end of the engine room.

The Court: How far away from this gasoline tank?

The Witness: Oh, about eight feet.

The Court: And that electric motor operated a small pump which the men would use when they were washing themselves?

The Witness: They were connected directly up to the galley. It took the suction off the fresh water tank.

The Court: Was there also a hose out there to the deck?

The Witness: No, that just goes up to the service pump. It is just a one-eighth horsepower motor.

The Court: Does that go on automatically [712] if pressure in the tank goes down?

The Witness: Yes, it does.

The Court: So if the men were drawing water off that tank to wash up, and the water in that tank went below a certain level, the electric motor down in the engine room would start going?

The Witness: That's right, yes, sir.

The Court: And that motor was about eight feet away from the fuel tank?

The Witness: Yes.

The Court: When you say eight feet away, do you take into consideration the distance from the deck of the engine room up to the——

The Witness: No, sir, from longitudinal.

(Testimony of Irvin Hansen.)

The Court: You don't measure it on any diagonal basis?

The Witness: Not on a vertical, no sir.

The Court: All right.

Q. (By Mr. Silvers): Did you make an inspection, Captain, of that particular electric motor on the afternoon we are talking about?

A. No, sir, I did not.

The Court: Let me ask one more question: Is that located on the floor of the engine room?

The Witness: No, sir, that's located on a [713] shelf.

The Court: How high?

The Witness: About four feet above the floor plates.

The Court: All right.

Q. (By Mr. Silvers): There has been testimony in this case, Captain, that one of the crew members who assisted in the engine room detail, Francois Cardinale, turned off the valves that fed these auxiliary motors after the men had washed the ship down at sea and just before they came into the gas dock for fueling.

When that valve is turned off after that operation, that would close the flow of gas to the carburetor, would it not? A. Yes, sir, it would.

Q. And no condition of overflowing could then follow in point of time?

A. No, sir. You have two positive valves there.

The Court: If those valves were turned off, nothing could get by them?

(Testimony of Irvin Hansen.)

The Witness: No, sir.

The Court: But if they were open, gravity of flow would continue and could flood the carburetor and continue to flow?

The Witness: Sir, that would happen instantaneously. If you are standing there in the engine room, you could see [714] it right away.

The Court: Yes, if you paid attention to it.

The Witness: Well, you smell gasoline pretty quick, sir.

The Court: All right.

Q. (By Mr. Silvers): When you had completed your inspection of this vessel on the afternoon of September 28th, was she, in your opinion, seaworthy?

A. Yes, sir, except for that pump.

The Court: Except what?

The Witness: The pump.

The Court: Except the pump?

The Witness: Except this.

Q. (By Mr. Silvers): What do you mean by that, Captain?

The Court: Wait a minute.

The Witness: I mean this bilge alarm, I don't mean pump. That bilge alarm, if you are not familiar with that, sir, that is a float valve that you set up about eight or ten inches below the bilge of the engine room, and that operates on a sliding rod, and if the water should ever get into that engine room and you didn't know it, and it got up above eight inches, it would push this float up until it

(Testimony of Irvin Hansen.)

made electrical contact with a little motor that would [715] immediately set the alarm.

Q. (By Mr. Silvers): Well, with that reservation, the reservation of the absence of the bilge alarm, was the vessel in your opinion seaworthy?

A. Yes. We just put those on lately.

Q. You mean the bilge electrical alarm?

A. Yes.

Q. Could the absence of that bilge electric alarm have any relationship to the production of the fire and explosion that took place, in your opinion?

A. No, not at all.

Q. It relates only to the control of water?

A. That is right.

Mr. Silvers: Thank you.

Cross-Examination

By Mr. Vartan:

Q. Your Honor, please, I left Mr. Frank Cardinale's deposition there. This has been introduced in evidence, your Honor.

The Court: Yes.

Q. (By Mr. Vartan): Do either one of these Wisconsin pumps that are run by gasoline through the feed lines make a noise when they are in operation? [716]

A. Well, like any gasoline motor, yes, they make a noise because they turn over very fast. I think they turn over about 4,000 rpm's.

Q. And if a vessel such as the Santa Lucia with

(Testimony of Irvin Hansen.)

the portholes and hatches, and so forth, to the engine room, such as has been described, which were open, were stopped within two or three feet of the gas dock, a person two or three feet above on the gas dock would hear those motors operating, wouldn't they?

A. You can hear them for quite a ways because they are a high-speed motor.

Q. And knowing the quality of the noise of the motor, if the gas attendant on the gas dock did not hear, stated that he did not hear any engines running on the Santa Lucia before the gassing and fueling operations started, it would be your opinion that the engines were not operating, isn't that true?

Mr. Nave: I object to that, if the Court please, as calling for a conclusion of the witness.

Mr. Vartan: There have been a lot of questions asked, even by your Honor, you know, that, in fairness to the Court, assume certain things.

The Court: We were just questioning an expert.

Mr. Vartan: Yes.

The Court: But you have in evidence the statement [717] of Caldwell. Caldwell said he listened and heard the engines turned over.

Mr. Vartan: Yes, that's what I want to be sure of.

The Court: That is in Caldwell's statement. That is in the statement which was introduced by Union. Cardinale says the engine was turned off, so we have direct testimony on that. Everybody agrees that the engines were turned off after the ship docked.

(Testimony of Irvin Hansen.)

Mr. Vartan: I can be very sure, your Honor.

Page 19 of Frank Cardinale's deposition says——

The Court: Counsel, I read that.

Mr. Vartan: He says he turned off the gas.

The Court: Counsel, give me credit. I read it.

Mr. Vartan: I have no further questions.

The Court: Mr. Nave, have you any questions?

Mr. Nave: Yes, I have, your Honor.

Cross-Examination

Mr. Nave: I call your attention to page 66 of Mr. Hansen's deposition. I want to ask him some questions in connection with that.

Q. (By Mr. Nave): Commencing on line 10, or line 7, Captain Hansen, do you recall that on November 28, 1955, your deposition was taken by me in connection with the trial of the case of [718] Cardinale against Union Oil Company?

A. I presume that is true. You took a deposition.

Q. At that time I asked you certain questions to which you gave certain answers in reference to your inspection aboard the fishing vessel Santa Lucia. I ask you now if I didn't ask you this question, to which you gave this answer?

“From your previous inspection, Captain, on the 10th of September, 1954, the gasoline tank was not painted at that time?”

To which you answered:

“It was painted but the paint was kind of old on

(Testimony of Irvin Hansen.)

it and so the same way on the Diesel tanks, also the engine room, so they just painted everything."

Is that correct?

A. That is correct.

Q. The next question:

"Then on your inspection of 28 September you saw that the gasoline tank, as well as the other tanks, had been painted?"

To which you answered:

"Had all been painted, yes, sir."

Is that correct? A. Yes, sir.

Q. Next question:

"But at no time were you able to or did ascertain what [719] the tank itself was constructed from?"

To which you answered:

"No, sir."

Did you not? A. That is right.

Q. Next question:

"You don't know whether it was 12 gauge or 16 gauge or steel or some other metal?"

To which you answered:

"No, sir."

A. That is correct, but it was steel. We know that. All of them were steel and they are all more or less the same kind.

Q. At the time your deposition was taken, Captain, you stated you didn't know what material it was constructed from and you didn't know the gauge? A. I still don't know the gauge.

Q. Next question:

"Now, on your inspection of that vessel on the

(Testimony of Irvin Hansen.)

10th of September, did you at that time have the Wisconsin pump and the auxiliary generator operated off the gasoline system?

“Answer: I did, yes, sir.”

Is that right?

A. Yes, sir, to the best of my knowledge.

Q. All right. On page 69 this question was [720] asked, beginning at line 17:

“Question: And what is done, what are the things that are done to start up the Wisconsin gasoline motor?”

Your answer, sir:

“He just presses a button like you do on your car.”

Did you give that answer at that time?

A. Well, I did, if you have it there.

The Court: Did you make that answer to that question?

Q. (By Mr. Nave): Did you give that answer to that question at that time?

A. That's what I said, I did.

Q. Question: “It has a self-starter?”

“Answer: Self-starter.”

Did you give that answer to that question at the time of your deposition? A. Did I say so?

The Court: Did you? He is asking you, Witness.

The Witness: Well, if I did, sir, all right.

The Court: Was it the truth? [721]

Q. (By Mr. Nave): Is that the truth?

A. It must have been the truth.

(Testimony of Irvin Hansen.)

The Court: Well, is it the truth? Did these engines have a starter for the ignition or not, or don't you remember?

The Witness: Let me answer this, your Honor.

The Court: Answer any way you want.

The Witness: There is about 150 of these boats. Some of them, we crank them, and some of them start, and I just don't remember.

The Court: You don't remember?

The Witness: I don't remember now. If I said so, it's the truth.

The Court: You see so many of these boats, you don't remember one from the other, do you?

The Witness: It is pretty difficult, sir.

Q. (By Mr. Nave): The next question:

"How about the auxiliary generator? Is that the same?"

To which you answered:

"The same thing."

A. I presume so.

Q. Question:

"The same thing is true?"

"Answer: Yes, Fairbanks Morse." [722]

Is that right, sir?

A. Yes. Well, you could qualify that, sir. It doesn't make any difference whether you press a button or put a switch on.

Q. I am just asking you, Captain. I don't want to argue with you.

A. Well, I mean it's the same procedure.

Mr. Silvers: He is entitled to explain.

(Testimony of Irvin Hansen.)

The Court: He can explain his answer, but what the Captain is telling me, it doesn't make any difference. It is my business to determine whether it make a difference. I think it does make a difference.

I think it makes a distinct difference as to whether or not these engines can be shut off without turning off that gasoline valve, and what happens if the engine is shut off and the gasoline valves are not shut off. It makes a big difference, and whether or not such a condition is a seaworthy condition aboard a ship of this type.

Q. (By Mr. Nave): Now, Captain, this question was asked you at the time of the taking of your deposition:

"How about the gasoline engine that runs the auxiliary generator?"

You stated:

"I don't know that, either." [723]

Is that your answer?

Mr. Silvers: This is unfair, your Honor. There is a previous question four lines above that.

Mr. Nave: I will be very glad to go back. Very glad to read any part, Mr. Silvers. I will go right back up to where we left off.

I asked you the question:

"Fairbanks Morse? Now, the Wisconsin gasoline pump is what size and horsepower?"

Your answer was:

"I don't know. It is just the standard equipment that they put out for all these pumps. It's about

(Testimony of Irvin Hansen.)

that long and the pump sets on this end of it and it is all one unit. The pump and engine are right together."

That was your answer, sir, to that question?

A. That is correct.

Q. "Question: You don't know, Captain, as to its horsepower?

"Answer: No, I don't."

Is that right?

A. That is right.

Q. "Question: How about the gasoline engine that runs the auxiliary generator?

"Answer: I don't know that, either." [724]

Is that right, sir?

A. Talking about horsepower?

Q. Yes. A. No, I don't.

Q. "Question: Is that the approximate size, approximately the same size?

"Answer: No, that is a smaller."

Is that right? A. Yes.

Q. "Question: A smaller one?

"Answer: Yes.

"Question: And that also is operated by a self-starter?

"Answer: Yes."

Did you give that answer at the time of your deposition, sir? A. Yes.

Q. "Question: Switch or button?

"Answer: Button.

"Question: And where are the buttons located?

"Answer: Well, they are right here along the

(Testimony of Irvin Hansen.)

motor, alongside the motor. I don't know just exactly because I was—I never start anything myself up on these inspections. I have the owners always do it. I was just standing about six or seven feet away and I said, 'All right, start up [725] that motor,' and he went and opened the valve here and came down and then closed the valve after we got through."

Is that right, sir?

A. (Nodding in the affirmative.)

Q. Page 72, line 8, this question was asked of you in reference to the gasoline tank, and you gave this answer:

"Did you determine on the inspection of this last inspection, September 28th, the amount of gasoline that was in the gasoline tank?

"Answer: No, sir, I did not."

Is that right, sir? A. That is correct.

Q. "Question: You did not make any sounding?

"Answer: No, sir."

Did you give that answer? A. Yes.

Q. "Question: You did not insert any measuring stick?

"Answer: No.

"Question: Did you tap the tank to determine how much gas if any there was in the tank?

"Answer: No, sir."

Is that correct?

A. That's right. No one else would ever dare to do that. [726] either.

(Testimony of Irvin Hansen.)

Q. "Question: So you don't know at that time how much gasoline was in the gasoline tank itself?

"Answer: No."

Is that your answer? A. Yes.

Q. "Question: I believe I asked you this. I just want to be sure I understood it if I did, that you did not at any time determine the composition of the tank itself as to material it was built out of, as to whether it was steel or galvanized iron?

"Answer: No, sir."

Is that right, sir? A. That's right.

Q. "Question: Or brass or anything else? And you on your prior inspections, speaking now of your inspection of September 10th at Monterey, did you make any examination of the gasoline tank at that time other than visual?

"Answer: I just crawled up to the top of it and took a look around on top to see if there was any piece or wrenches or anything of that sort, because they have a habit of putting everything [727] out on top of the tank. Looked to see whether it was clean."

Is that right, sir?

A. When I say tanks, I mean on these Diesel tanks and also up on top of the gasoline tanks.

Q. And also up on top of the gasoline tank?

A. (Continuing): But mostly it is always rags they put up there.

Q. Now, Captain, there were batteries in the engine room, were there not? A. Yes.

Q. And those batteries are heavy-duty type?

(Testimony of Irvin Hansen.)

A. They are.

Q. And the system was a 32-volt system?

A. Yes, sir. 100 amp. per hour.

Q. Captain, on the morning you were aboard the Santa Lucia on the day of this explosion, did you have coffee in the galley?

A. Before, I did, yes. In the galley, yes.

Q. Did you make any inspection of the stove aboard the ship at that time?

A. Yes, sure, I looked at the stove.

Q. You looked at the stove? A. Yes.

Q. And do you know what the source of fuel was that fed [728] the burners?

A. Sure. Diesel oil.

Q. Diesel oil? And do you know how the Diesel oil is conveyed from the storage tank to the stove?

A. Yes, the storage tank is up on top of the galley. It comes through by gravity.

Q. There was a tank up on top of the galley, is that your testimony, sir?

The Court: If you remember, Captain.

The Witness: I don't remember now. Most of them have a tank on top of the galley.

Q. (By Mr. Nave): You don't remember now whether they had a tank on top of the galley or not?

A. I don't know, but they are fed by gravity.

Mr. Nave: I have no further questions.

The Court: Thank you. Witness excused.

(Witness excused.)

Mr. Silvers: Respondent Cardinale and Libelant Cardinale rest, your Honor.

The Court: Everybody rests. I tell you what to do. Check over until tomorrow morning to see if you have any more evidence. Suppose you come in tomorrow morning at 10:00 o'clock. Or if you want to come inside a few minutes, I will see you [729] inside.

Mr. Vartan: Your Honor, could we see you in chambers?

The Court: Yes, come inside.

(Thereupon, this cause was recessed to Wednesday, September 11th, 1957, at the hour of 10:00 o'clock a.m.) [730]

September 11, 1957—10:00 A.M.

The Court: You gentlemen have had overnight to determine whether you have any additional evidence to present. Is there any evidence Libelants desire to present?

Mr. Vartan: No, your Honor.

The Court: Is there any evidence Respondent Union Oil desires to present?

Mr. Nave: No, your Honor.

The Court: And Respondent Cardinale?

Mr. Silvers: No, your Honor.

The Court: Do you desire to present any further evidence in connection with the petition by Cardinale and the owners of the Santa Lucia for limitation?

Mr. Silvers: No, your Honor.

The Court: Has the answer to the petition for limitation been prepared and filed?

The Clerk: The answer has been filed, your Honor.

The Court: So the case is now submitted?

I will be prepared to give you my decision tomorrow morning. I will announce it from the bench and it will be given on the record. Will 10:00 o'clock be convenient to you all, or would you prefer 1:00 o'clock?

Mr. Silvers: That will be better for me.

The Court: Then we will adjourn until tomorrow [731] afternoon at 1:00 o'clock, and I will give you my decision.

(Whereupon, this case was submitted and the proceedings closed.)

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s), pro tem, certify that the foregoing transcript of 732 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ [Indistinguishable.]

/s/ [Indistinguishable.]

/s/ [Indistinguishable.]

[Endorsed]: Filed January 30, 1958.

Nos. 15875-76-77-78-79

United States
Court of Appeals

For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JOSEPH SALMERI, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

FRANCISCO L. PEDRASAZ, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI, Administrator of the Estate of
JACQUES CARDINALE, Deceased, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

IDALENE J. CARDINALE and FRANCES E. CARDINALE,
Administratrixes of the Estate of FRANK J. CARDINALE,
Deceased, Appellees.

Transcript of Record

In Three Volumes

Volume II

(Pages 57 to 362)

FILED

MAY - 2 1958

PAUL P. O'BRIEN, CLERK

Appeals from the United States District Court for the
Northern District of California,
Southern Division.

Nos. 15875-76-77-78-79

United States
Court of Appeals

For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JOSEPH SALMERI, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

FRANCISCO L. PEDRASAZ, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

ANTOINE BELLECI, Administrator of the Estate of
JACQUES CARDINALE, Deceased, Appellee.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

IDALENE J. CARDINALE and FRANCES E. CARDINALE,
Administratrixes of the Estate of FRANK J. CARDINALE,
Deceased, Appellees.

Transcript of Record

In Three Volumes

Volume II

(Pages 57 to 362)

Appeals from the United States District Court for the
Northern District of California,
Southern Division.

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

No. 27117

JOSEPH SALMERI,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents.

No. 27119

FRANCISCO L. PEDRASAZ,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents.

No. 27125

ANTOINE BELLECI, Administrator of the Estate
of JACQUES CARDINALE, Deceased,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents.

No. 27364

IDALENE J. CARDINALE, and FRANCES E.
CARDINALE, Administratrix of the Estate of
FRANK J. CARDINALE, Deceased,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents.

Before: Hon. Sylvester J. Ryan, Judge.

TRANSCRIPT OF PROCEEDINGS

Appearances

Proctor for Libelants:

SAMUEL VARTAN, ESQ.,
RUSSELL ZACHES, ESQ.,
JOHN J. WHELAN, ESQ.

Proctor for Respondent Cardinale:

MORTON L. SILVERS, ESQ.

Proctor for Respondent Union Oil Co.:

BOYD & TAYLOR, By
FREDERIC G. NAVE, ESQ.

Tuesday, Sept. 3rd, 1957—10:00 A.M.

The Clerk: Salmeri, et al., versus Cardinale, et al., fifteen consolidated cases for trial.

Will counsel for the Libelants state their appearances for the record?

Mr. Vartan: Samuel Vartan.

Mr. Whelan: John J. Whelan.

Mr. Zaches: Russell Zaches.

The Clerk: Will counsel for the Respondents state their appearance for the record?

Mr. Silvers: Morton L. Silvers for Respondents Cardinale, Idalene Jenner Cardinale and Mrs. Frank Cardinale.

Mr. Nave: Frederic G. Nave for the Respondent Union Oil Company of California.

The Court: All parties ready to proceed?

Mr. Silvers: Yes, your Honor.

The Court: Do you desire to make an opening statement?

Mr. Vartain: Yes, your Honor.

The Court: You may do so.

Mr. Nave: Your Honor, for the purpose of the record, before counsel makes his opening statement, I would like to renew the motion to dismiss the wage actions that have [4*] been filed in four wage cases. One is Salvatore Romeo, Action No. 27157; Joseph S. Romeo, Action No. 27156, Horace Adagio, Action No. 27159, and Francois Cardinale, Action No. 27158, upon the grounds and bases that the Union Oil Company is not their employer and that we do not believe there is a cause of action stated for lost wages against the Union Oil Company.

The Court: You desire to be heard in opposition to this motion?

Mr. Vartan: Yes, your Honor. With your Honor's consent we would like to present a memo-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

random which we are preparing now and we will have it here this afternoon or tomorrow so that your Honor can read the cases we are relying on. As Mr. Whelan stated, the matter was heard before Judge Goodman on motion and exceptions were overruled and memorandums were filed at that time. The matter was briefed, as I recall quite thoroughly, but we would like to supplement that memorandum with anything new that we have so that your Honor can at your leisure read the cases.

The Court: I think it would be sufficient if you just submitted me carbon copies of the briefs you submitted to Judge Goodman, wouldn't be necessary to have new ones typed.

Mr. Vartan: Yes, we can do that, your Honor.

The Court: I haven't had an opportunity to examine your libels in these four suits; I will do so, and at this time I will reserve decision. I feel that no injustice will be [5] done to the Respondent to proceed with the trial, reserving decision on your motion to dismiss.

I take it that you did file exceptive allegations to the libels?

Mr. Nave: Yes, your Honor.

The Court: And they were brought on before Judge Goodman?

Mr. Nave: He overruled it and stated that they should be renewed at the time of trial.

The Court: Yes. I will reserve decision at this time on this motion. I will give you my decision as the trial progresses. In the other cases are you ready to proceed with the trial?

Mr. Vartan: Yes, your Honor.

The Court: You desire to make an opening statement?

Mr. Vartan: Yes, your Honor.

The Court: You may do so.

Mr. Vartan: May it please your Honor, these actions arise from a flash fire and explosion, the explosion being gasoline vapors, during the fueling of a fishing vessel. One member of the crew was killed, two seriously injured and others suffered lesser injuries.

Very briefly, your Honor, the facts, as we see them, and if your Honor will bear with me because we may not [6] read depositions in the course of the trial, I would like to state our complete theory, factually and legally so that as the witnesses take the stand your Honor will know the purpose of their testimony.

On September 28th, 1954, the Santa Lucia was a fishing vessel fishing for anchovies off the coast of San Luis Obispo in Central California. This vessel, your Honor, was a typical fishing vessel, 85 feet in length, carried a crew of 10 men.

On the afternoon of the day of this occurrence the vessel had discharged its catch of anchovies in the Bay of Avila, gone out to the high seas and cleaned up, and they had intended then, your Honor, and it will be important in this case, changed nets and go further south into the San Pedro area to fish for cardines. In other words, they were all through with anchovies.

The Union Oil Company, the Respondent in this

case, the co-respondent, maintained a large wharf or pier at Avila with complete fueling facilities. A diagram, your Honor, for illustration purposes, is on the board and shows this very briefly, the shore is over here, the wharf continues out seaward and enlarges into a rectangle. At this point, which will be called an offset, during the course of the testimony, was maintained a service station, as it were, for marine vessels, a retail sales station and is maintained by Union, [7] of course. This shows an enlargement of this area.

The Santa Lucia at the time of this fire and explosion was tied to the offset as indicated with its bow headed towards shore. Then there was another vessel, a tug called the Avila that was tied up there, some of the witnesses were sitting there fishing. It's about 40 feet away.

The setup here on the fueling station involved the gasoline tank that held, I believe, a couple of thousand gallons of 76 gasoline, which is a regular commercial high octane gasoline.

The pipes leading from this large tank took off from the bottom of the tank, went over in this direction and over here. At the point about six feet from the edge of the dock, your Honor, was maintained a meter which registered the amount of gasoline being delivered from the meter, and then at the meter were two valves to turn the gas off and on. At the edge of the dock was a hose reel with 40 to 50 feet of hose with a nozzle on the end of it which was lowered to the Santa Lucia.

Now, when the Santa Lucia first came in from the

high seas it approached Berth 4, or this area here (indicating), and at that time Mr. Cardinale, the owner and operator of this vessel shouted at the Union Oil man and said, "I want 30 gallons of gasoline."

Caldwell, the Union gas attendant, whose particular [8] job it was to run that fueling station, then directed the Santa Lucia further towards the shore to that offset, and he walked over.

The evidence, your Honor, will show that when the Santa Lucia arrived there and tied up Mr. Cardinale, who was killed in this accident, the skipper, again ordered 30 gallons of gasoline. Mr. Caldwell, who had charge of that marine station for Union Oil, then lowered the gas hose to Mr. Cardinale, checked the meter and saw that it registered zero, turned on the valves and the flow of gasoline began.

Some eight to ten minutes later, your Honor, and the evidence will be in conflict on this point, there will be some evidence to the effect that the skipper yelled up at the Union dock and say, "Hey, haven't I got my thirty gallons yet?"

There will be some evidence which will say that Caldwell, the Union Oil man, first brought up the question of how many gallons were delivered. At any rate, it will be conceded by everybody in this courtroom that instead of 30 gallons, 60 gallons of gasoline passed through that and registered on the meter. It will be conceded, I am sure, by both Respondents in this case, that the gasoline tank, your Honor, that was being filled was limited in capacity

to about 30 to 35 gallons. So we have in this case an over delivery of 20 to 30 gallons of high octane gasoline. [9]

Shortly after the conversation, "Have I got my 30 gallons," or "You have got 60," and so forth, between these two Respondents, there was a sudden flash out in the open.

Following the flash by a second or so was a terrific explosion within the bowels or within the—from the inside of this vessel. Now, that is the heart of the facts of what took place.

The position of the Libelants in this case, your Honor, is that we were members of the crew. As a matter of fact, the evidence will show that they were busy cleaning the net and working and cleaning the hatch at the time this entire fueling operation took place. The dead man and the others, in effect, were innocent bystanders, they had nothing to do with the fueling operations whatsoever.

The Libelants here are in court with the Respondents Union Oil and the Estate of Cardinale, the deceased skipper and operator, shifting the responsibility one to the other. Our position, your Honor, is that they are both jointly and severally responsible to the Libelants.

The Court: What's the basis upon which your Libelants saved liability with respect to the owner of the ship?

Mr. Vartan: The owner of the ship, your Honor, is based upon the marine tort—you mean as to the survival? [10]

The Court: You're suing here on behalf of several seamen.

Mr. Vartan: Yes, your Honor.

The Court: Who are still alive, and on behalf of a deceased seaman?

Mr. Vartan: Yes, your Honor.

The Court: Your libel is a libel in personam?

Mr. Vartan: Yes, your Honor.

The Court: And you are suing as Respondents the owners of the ship and the Union Oil Company.

Mr. Vartan: Yes, your Honor.

The Court: What is the basis of your liability as against the owners of the ship?

Mr. Vartan: It is based upon the negligence of the owners of the ship and it survived his death pursuant to the statutes in this territory.

The Court: In what respect do you allege that the owners of the ship were negligent?

Mr. Vartan: The owner of the ship, your Honor—oh, I get your point. When the gas hose was handed down to the dock, to the deck of the vessel, the man who took the nozzle end of the hose and inserted it into the fill pipe, which was flush with the deck, the gasoline tank being underneath, strapped in the engine room somehow, our position, your Honor, is that Cardinale, the skipper and owner, was actually [11] the man at the other end of the nozzle, as it were when this occurred.

The Court: In what respect do you maintain he negligently acted?

Mr. Vartan: Well, I was just coming to that, your Honor. We are proceeding in this situation and

relying necessarily upon the doctrine of *res ipsa loquitor*. In other words, first this was an accident which wouldn't take place unless somebody was negligent. That's the first essential.

Secondly, the agency, the thing that caused this fire and explosion was in the care, control of both Union Oil Company and Cardinale, the owner and operator of the vessel.

Now, it is our position, your Honor, and under the cases which have been applied to Admiralty torts, *res ipsa* in such situations applies, and we have prepared a brief which sets forth those cases.

Now, our position is that with that showing of exclusive care and control over the instrumentality and agency of the thing that caused this fire and explosion, being in Union Oil and Cardinale, then there is an inference of negligence and the burden is on them to proceed further. They have the superior knowledge. Our boys were busy working on the nets and we, as I have stated, have cited cases, both California cases and cases that have been followed in the Admiralty Court matters. [12]

In the process of proving *res ipsa*, your Honor, we feel that the evidence will probably make out a case of negligence against both of these parties. In other words, Union Oil Company is a purveyor or seller of a dangerous commodity. They were the only persons, Union Oil was the only person who could see this meter, that was the only instrument by which a positive indication of the flow of gasoline could be seen.

The Court: I don't know that the doctrine of *res*

ipsa loquitor applies to the situation. However, I will listen to the evidence. I think you are bound more to prove a negligence of either one or both of the Respondents.

You claim, then, as I understand it, insofar as it is based upon negligence as against both Respondents is that there was negligence in handling of this dangerous material which imperiled the safety of the ship and those aboard here?

Mr. Vartan: Yes, your Honor.

The Court: Do you maintain that the ship itself was unseaworthy?

Mr. Vartan: Well, we are in no position to prove specific acts or specific points involving unseaworthiness, your Honor. We are relying on *res ipsa* and I believe, your Honor, after you read the cases which are almost in point—in other words, in explosions of this nature here, your Honor, where innocent bystanders or the crew that is not involved [13] whatsoever in the process takes place, necessarily all we can do, otherwise we wouldn't have a day in court, is to show who had charge of this thing, and then it's their job to come in and prove that their vessel——

The Court: Perhaps you are confusing the *res ipso loquitor* with the rule of law we have that permits you to establish your case by circumstantial evidence, proof of circumstances. Do I understand, then, that there is no claim by the Libelants that the ship itself was unseaworthy?

Mr. Vartan: Oh, yes, we do claim there was an explosion from within the inside of the vessel; in

what particulars the vessel was unseaworthy, we are in no position to say.

I don't want to take up your Honor's time on the question of damages unless your Honor wants me to precisely state the damages sustained.

The Court: I don't desire to have you make any statement you don't want to make yourself.

Mr. Vartan: Very well, your Honor. Well, very briefly, Jacques Cardinale was killed. He was 47 years of age. His wife and two children, a boy ten and a girl fifteen, both the wife and children reside in Algiers. Depositions have been taken which will be introduced into evidence here.

Then Joseph Salmeri, he was a crewman, his right arm was very badly and seriously injured. Without going into [14] the details he now has very limited use of his right arm, and that is a permanent situation. He has been a seaman all of his life earning three to four thousand dollars a year.

Frank Pedrasaz also was a seaman and he suffered an arm injury and he has a limitation in the use of his arm which will be permanent. He was taken to the Marine Hospital and treated there.

Now, Belleci and Tarantino have lesser injuries which will develop during the trial.

The remaining Libelants, your Honor, are the Libelants for wages against both Respondents.

The Court: Have you filed a claim for maintenance and cure on behalf of these seamen?

Mr. Vartan: Yes, your Honor.

The Court: Are you forcing the claim for cure, or are you resting solely on the claim for maintenance?

Mr. Vartan: We are pressing both maintenance and cure, your Honor.

The Court: Do you maintain that the medical care and attention that these men acquired for their ailments was not obtainable at a marine hospital?

Mr. Vartan: That's right, your Honor.

The Court: Is there any dispute as to the prevailing rate of maintenance that should be allowed in the event an allowance is made? [15]

Mr. Nave: I don't believe there is, your Honor.

The Court: Stipulated that would be \$8.00 a day, then?

Mr. Nave: That's correct.

The Court: Both sides?

Mr. Vartan: Yes, your Honor.

The Court: All right.

Mr. Silvers: I would like to add a few remarks on behalf of my clients. your Honor, the owners of the fishing boat.

The evidence will establish that at the time that the Santa Lucia came alongside to request gasoline it did this for the purpose of filling an auxiliary tank which, as Mr. Vartan indicated, has a capacity of approximately 30 gallons; that Frank Cardinale, one of the decedents and who is one of the co-owners of the vessel, at the time he informed the Union Oil attendant of his desire to take on 30 gallons of gas was on the main deck of the Santa Lucia some 10 feet below the level of the fueling dock where this service station was located.

The evidence will show that in addition to the gas

meter which registered the flow of gas being six feet back from the dock's edge below which Cardinale stood on the main deck of the fishing vessel the meter itself stood only approximately 26 inches above the level of the fueling dock and was not visible to one in Cardinale's position by the fill [16] pipe which was flush with the main deck of the Santa Lucia.

The evidence will show that actually the Union Oil attendant Caldwell did glance at the meter, according to his own testimony, shortly after it began to register the flow of gasoline and observed that it was then at a 20 gallon reading.

The evidence will show that he busied himself with the supplying of water hoses to the vessel and preparing his ticket for the recording of the sale and that he did not again look at the meter until the registration was approximately 58 or 60 gallons.

The evidence will show that at that point he went to the edge of the fueling dock to communicate this information to the decedent Cardinale, Frank Cardinale, who went around, who took out from the fill pipe the nozzle of the gas hose, placed it on the deck went around to the starboard side of the vessel and disappeared from the view of the Union Oil attendant, but reappeared in a very brief interval of approximately a half a minute or a minute with what appeared to be a wooden measuring stick; that Frank Cardinale then proceeded to the fill pipe raised the wooden measuring stick preparatory to inserting it, and at that point there was a flash, an explosion, and fire appeared.

The evidence will further show that one of the crew members of the Santa Lucia just before the explosion took place observed the Union Oil attendant running from the [17] edge of the fueling dock back to the side of a small building on whose side was a fire extinguisher. This is just before the explosion that tore apart the Santa Lucia took place.

There will be further evidence from one of the eye witnesses on the small tug Avila some 50 or 75 feet away from the fishing boat that the Union Oil attendant was seen to run in the direction of the fire extinguisher, that a few seconds after that there was a flash observed, a white flash outside the boat in the area of the dock, and it is our position that the excess flow, the excess amount of gasoline in this case was ignited dockside and communicated to the interior of the vessel where the explosion took place in the engine room below which tore apart the vessel, sinking it and causing the injuries and deaths that have been described, that there is no other explanation for the sequence and visual phenomena which we have just described.

We will produce further affirmative evidence, your Honor, that just 90 minutes before this explosion took place a complete inspection was made of the Santa Lucia by a marine surveyor who by appointment was in Avila that day to make an inspection for insurance purposes for the renewal of the insurance on the vessel, that he inspected—Captain Hanson is his name, Captain Hanson inspected the Santa Lucia some 90 minutes before this explosion making a complete investigation and exami-

nation of all parts of the vessel, [18] including the engine room, the 30 gallon metal gas tank that we have referred to and all fittings and pipes leading to it and from it, that in all respects he found the vessel seaworthy, the tank intact and nothing wrong whatsoever with the fittings; that the explanation and responsibility for the events that followed lie with the Union Oil Company and derived from the negligence of their attendant which I have briefly described for the Court.

Mr. Nave: May it please your Honor, the Union Oil Company in this case, the evidence will show, maintained a service station installation where it supplied gasoline. The hose that runs from the gasoline service station on top of the dock is a hose that is on a reel and is lowered by an attendant and it has what we would call a self serving operation. There is a lever on the end of the hose very similar to the type of hose one finds in a gasoline automobile service station where the person who takes the gasoline inserts the end of the hose into an opening and pushes down a lever so that the gasoline flows from the hose through the nozzle, and to turn it off all that is required is merely to release the handle. It isn't a locking device, it's simply a spring-type nozzle that in this case that Mr. Cardinale had complete control of and he inserted the nozzle into the fill pipe on the deck. There is no pressure, this isn't a pressure operation, it's a gravity-type operation from the fuel tank, [19] the nozzle itself, the brass nozzle, does not fit tightly into the fill stem into the ship, the fishing boat in this case, so if you have a

seaworthy tank, as soon as that tank, whether its capacity is 30 gallons or 35 gallons or somewhere in that neighborhood, as soon as that tank had received its capacity, the gasoline would surge out of the neck of the fuel tank onto the deck so that the operator had complete control, that is, Mr. Cardinale himself, controlled merely by releasing the release thing in his hand to turn it off.

The evidence in this case will show that there was no spilling of any gasoline anywhere, dockside or on the fishing boat itself; that the only answer, the only thing that one could possibly say is that there had to be an unseaworthy gasoline tank here and a failure of the gasoline tank and that the gasoline was brought into that tank, whether it was 30 gallons or 5 gallons or 10 gallons into a tank that was unseaworthy and defective and went down into the bilges of that engine room, that a violent explosion took place, it blew this fishing boat up and caused these injuries that counsel has explained to you.

We believe that the evidence will show, your Honor, that this fishing boat was unseaworthy. The allegations in the complaint that have been filed by Proctors for the Libelants here, all have specific charges in the complaint itself, and I read from Paragraph VIII of one of the complaints, [20] illustrates the same language that is carried forward throughout in which it is charged in the complaint, and I refer to Paragraph VIII, and I am reading from the action 27159, the case of Horace Adagio versus Union Oil Company, in which it is stated that:

“On or about the 28th day of September, 1954, and for a long time prior thereto said vessel was unseaworthy and the decedent, Respondent Idalene Jenner Cardinale failed to supply, keep in order, proper tools and appliances for the purpose of said vessel at all of said times said vessel—said decedent and said Idalene Jenner Cardinale kept and maintained said vessel in an unsafe and defective condition in that there were in the engine room of said vessel certain appliances, machinery, appurtenances and equipment capable of giving and which did give off and emit sparks and flames and were uncovered, exposed and uncapped and the sparks and flames on and about said vessel were unconfined in that said decedent and Idalene Jenner Cardinale kept and maintained the galley of said vessel and stove pipe therein in such defective and improper [21] condition in that they were old, worn, loose, and with holes in said stove pipe which permitted and caused sparks and flames to be given off and emitted in, around and about said galley and from said stove pipe; that at all of said times said decedent, said Idalene Jenner Cardinale, negligently caused and permitted said unseaworthiness of said vessel and said failure to supply and keep in order proper tools and appliances appurtenant to said vessel to be, remain, and exist.”

We believe that the evidence in this case will show, your Honor, that Captain Hanson, the marine inspector mentioned by Mr. Silvers, approximately two years before this accident had made a marine in-

spection for insurance purposes in which he found the vessel to be dirty, evidence of bad housekeeping, that the wires and conduits were open, were not taped and that the vessel, he gave it, generally speaking, a very bad bill of health.

We will find that a year later, approximately a year before this particular accident, substantially the same conditions were again found to exist by Captain Hanson aboard that vessel; that there was no report made, no other inspection survey made on the day that Captain Hanson came down there. [22] You will find his testimony, which is introduced in the other case, in depositions taken prior to that trial, which will be offered, you will find that Captain Hanson did not know the size of the gasoline tank, made no tests, he didn't know of what material it was made, merely made a cursory examination of the tank itself.

We feel that this is a case that could not possibly have happened under any theory of any type or character whatsoever unless there had been an unseaworthy and defective tank aboard the fishing boat.

The evidence will also show that in the galley of this ship, contrary to posted signs inside the dock there, there was an open flame being maintained in the galley of that ship, and we feel that the evidence will show that there was a violent explosion aboard this fishing boat which transmitted, by blowing up the vessel, fire up onto the dock and that the fire did not originate on the dock.

We will show from all of the evidence that all the equipment on the Union Oil wharf, including the

pipe, the pipelines and tanks show definitely that there was no explosion or rupture. In fact, the gasoline—it didn't burn as a result of the fire being flashed back on the explosion of the vessel and was later salvaged and used.

We feel that this is a case where the evidence is inescapable, that there was an unseaworthy vessel and that the [23] gasoline tank, if it had been normal, a normal gasoline tank, that the excess gasoline would have come back out of the fill pipe and made itself known by spilling on the deck, and then Mr. Cardinale himself having the means by shutting it off merely by releasing the lever, was derelict in his duty in not supplying a seaworthy vessel, not only to the crewmen who are in this Court, but to the Union Oil Company in this case.

Now, I wish to say, inasmuch as counsel has injected the doctrine of *res ipso loquitor*, and I won't argue it at this point, but I would say certainly this is not a case in my opinion where the doctrine of *res ipso loquitor* could possibly aid the plaintiff in producing any burden to go forward or showing any negligence on the part of the Union Oil Company that should permit recovery in this action.

The Court: Proceed.

Mr. Vartan: Your Honor, may I leave the briefs I mentioned at this time?

The Court: I will receive any briefs of the Proctors provided they give copies to the other side.

Mr. Vartan: Mr. Salmeri, will you take the stand?

JOE JOHN SALMERI

a witness called upon his own behalf, having first been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [24]

The Clerk: Please state your name to the Court.

The Witness: Joe John Salmeri.

Direct Examination

By Mr. Vartan:

Q. I don't think you have to lean over into that microphone, just sit right back.

What is your age, Mr. Salmeri?

A. Thirty-six.

Q. Are you a married man? A. Yes, sir.

Q. Any minor children living at home?

A. Two.

Q. I see. What are the ages of the children?

A. Three and seven.

Q. What is your wife's name?

A. Mary Salmeri.

Q. What is her age? A. Twenty-six.

Q. How long have you lived in Monterey, California? A. 36 years.

Q. What is your business or occupation, Mr. Salmeri? A. Fisherman.

Q. How long have you followed that occupation? A. About 21 years. [25]

Q. On September 28, 1954, you were a member of the crew of the Santa Lucia? A. Yes, sir.

Q. That is the day of the fire and explosion at Avila, is that true? A. Yes, sir.

(Testimony of Joe John Salmeri.)

Q. How long had you worked on the Santa Lucia prior to September 28, 1954?

A. Oh, about two weeks, maybe three.

Q. Who gave you the job, please?

A. Frank Cardinale.

Q. He was the owner and operator?

A. Yes, sir.

Q. That is the owner and operator of the Santa Lucia?

A. Yes, sir.

Q. When you first went to work on the Santa Lucia, Mr. Salmeri, where did you go with the vessel?

A. Went to Avila.

Q. How long did you fish there?

A. Between two weeks and three weeks.

Q. What were you fishing for?

A. Anchovies.

Q. Now, will you tell His Honor, please, what your duties were on the vessel during the time you were employed there?

A. I was a skiff man and deckhand also. [26]

Q. Did you have anything to do with the operation of the vessel, that is, the machinery?

A. No.

Q. Did you have occasion to go into the engine room in the course of your duties?

A. No, sir.

Q. At any time since you had been on the Santa Lucia?

A. No, sir.

Q. Now, coming to the day of this occurrence, had you been fishing that day?

A. Yes, sir.

Q. And where had you been fishing?

(Testimony of Joe John Salmeri.)

A. Oh, in an area maybe three miles, eight miles, an area about that much.

Q. All right. Now, did you return back to the harbor—I assume you went out fishing in the morning?

A. That's right.

Q. When did you return to the harbor?

A. Oh, somewhere, might be two or two-thirty, somewhere around there.

Q. What was your purpose in returning?

A. To unload our fish.

Q. And you unloaded that where?

A. At one of the docks where they unload fish, I don't know the name of it. [27]

Q. After unloading the vessel where did the vessel go?

A. We went out—we had a few scattered fish in the bilges and had to clean out the hatch.

Q. And where did you do that?

A. We went out, maybe two miles, three miles.

Q. From shore? A. From shore.

Q. Now, after going out and cleaning the vessel, where did the vessel go?

A. After we cleaned it?

Q. Yes. A. We started coming in.

Q. I see. About what time of day was it, then?

A. Well, might be six, six-thirty, somewhere around there.

Q. Subsequently the Santa Lucia tied up at the dock at Avila, is that right? A. That's right.

Q. When the Santa Lucia first approached the Union Oil dock at Avila, did you hear any conversa-

(Testimony of Joe John Salmeri.)

tion between anyone on the Santa Lucia and anyone on the wharf as to the purchase of gasoline?

A. Well, I heard something like talking, but I couldn't get what they were talking about.

Q. In other words, you didn't hear any specific words that were used, is that right? [28]

A. No, sir.

Q. Now, after the Santa Lucia tied up I assume it was at the gas dock, is that right?

A. That is right.

Q. Did you assist in tying? A. Yes, sir.

Q. Now, do you recall hearing any specific words between anyone on the Santa Lucia and anyone on the gas dock after you tied up?

A. After we tied up?

Q. Yes.

A. Probably the same thing, I heard some conversation went on, but I wasn't paying much attention to it.

Q. So you don't remember any specific talk?

A. No, sir.

Q. What were you doing after the vessel tied up?

A. Well, we got towards the center of the hatch and we started talking, going to see what we were going to do with the brail, clean it up or not, and someone suggested why not wait until they started the engines up, otherwise we would need about four men to pull her up.

Q. Pull what up? What are you talking about?

A. This brail, when we brail we put the fish into the hatch, got a long brail like a ring, got a piece of

(Testimony of Joe John Salmeri.)

net with a long tail on it and these anchovies, they guild to this web, [29] and the only way we can get those out, we got to lift them up and get these small scoops and knock their heads off.

Q. The heads of the anchovies?

A. Anchovies, that is right.

Q. I see. And that brail that you're talking about is ordinarily lifted by what means of power?

A. By winch.

Q. And the winches are operated by what?

A. By the engine.

Q. But on this particular occasion was the brail lifted by the power from the engine? A. No.

Q. How was it lifted?

A. By hand, we had three or four men.

Q. How many men?

A. About three or four men.

Q. I see. So you were engaged in that activity, is that right? A. Yes, sir.

Q. Now, it took three or four men to lift the brail; how many men were working on the cleaning process?

A. Well, usually two hold the brail out and maybe a couple of us, one on each side with a scoop, we keep hitting the heads off.

Q. Now will you tell me then what happened after that, [30] after you were working on the net or cleaning the brail, what happened after that?

A. Well, once we got the heads all off the fish fell off onto the deck, we started picking them up,

(Testimony of Joe John Salmeri.)

to gather them up so we could throw them overboard, just maybe get about fifty pounds by that.

Just before—we were down, I was all wet, I was down below and I washed the hatch up and so I figured I will change. So I started, headed for the galley, and I see the skipper, the fish skipper, the fish skipper, the one who lays out the fish, Romeo, I called him and asked him if it was all right if I changed my skivvy shirt and he says, "Sure, go ahead." And I hesitated and I started walking toward the galley door.

As soon as I got one foot in the galley door I heard a boom like that—whish—(indicating) something like that, and then I heard the second blast, was like another boom, that is the last I remember.

I remember I was in the air, my head was like, going just like somebody hit me in the head with a bat or something.

Q. Now, you mentioned that you heard two noises, is that right? A. That's right.

Q. Will you describe the two noises and space them about [31] the way you remember hearing them?

A. Oh, it was like a blast, like a big wish; maybe a second or two later something like a bong just—probably on the first blast I had went—it's hard to explain.

Q. But there were definitely two noises?

A. Two, that's what I heard.

Q. What does your memory next tell you happened?

A. Well, I found myself like coming to, I

(Testimony of Joe John Salmeri.)

couldn't figure out what happened and I started praying and I turned my head to my, facing my right arm, I seen my right arm all disfigured and I didn't know what to do, I just laid there moaning.

Q. Now, Mr. Salmeri, at that time did you recall seeing Jacques Cardinale?

A. Jacques Cardinale? Well, when they lifted me up I was looking down like towards the hatch and I see a body. I didn't know it was him at the time, his head down in the hatch and his feet were facing the stern of the boat. They were on deck, his feet.

Q. I see. Were there any timbers or anything on top of his body?

A. I mean I didn't notice too much.

Q. I see. Now, what occurred after that? Were you able to leave the vessel under your own power?

A. No, sir, someone picked me up and I found out after who it was, and I remember they put me on the stern of the boat [32] and I guess everybody was yelling and crying and all that and somebody kept saying, "Hurry up, pull the skiff, the boat is sinking and the wharf is going to go off."

Q. The wharf what?

A. That the wharf is going to go off, explode or, the tanks and all that.

So I kept looking toward the water, I want to throw myself off the stern I was so scared. So I guess in the meantime they pulled in the skiff and they put me the first one in the skiff and put me down on the skiff.

(Testimony of Joe John Salmeri.)

Q. Was it a practice to have the skiff tied onto the boat and to follow the boat in the water?

A. We always do that.

Q. In other words, it wasn't necessary to lower the skiff from the vessel into the water?

A. No, sir.

Q. It was already in the water?

A. Yes, sir.

Q. You say you were the first one in the skiff?

A. That's what they told me.

Q. Now, will you please estimate for us the length of time it was from the last boom, the second boom or noise until you were taken off into the skiff?

A. I can't say exactly, I mean, might have been maybe seven or eight minutes, somewhere around there, as near as I [33] can figure.

Q. Mr. Salmeri, during the time that you were on the Santa Lucia and during the time you found yourself in the skiff, did you notice any fire on the Santa Lucia? A. No, I never.

Q. Did you see any fire on the Union Oil gas dock while you were on the Santa Lucia and before you were lowered into the skiff?

A. No, I didn't notice, I had my head down and I didn't pay much attention.

Q. Now, subsequently, at any time subsequently did you see fire on the gasoline dock, the Union Oil dock?

A. When I was laying down in the skiff, when

(Testimony of Joe John Salmeri.)

they laid me down I was looking up at an angle, and I could see fire up there.

Q. Where was the fire, please?

A. Around the dock, high flames. At the same time I heard men were hollering that the wharf was going to go off.

Q. I see. You were at that time in the skiff. Can you give us any idea where the skiff was then in relation to the Santa Lucia?

A. It was around the stern of the Santa Lucia.

Q. I mean in feet.

A. The skiff, they run about twenty feet long, I guess, maybe more, twenty-five. [34]

Q. I think you misunderstood my question. When you were in the skiff you testified you looked up and saw flames on the dock?

A. Yes.

Q. Now, at that time where was the skiff in relation to the Santa Lucia, how far away was it from the Santa Lucia?

A. From the Santa Lucia?

Q. Yes, when you saw the flames.

A. Well, it was sitting right off the stern of the Santa Lucia, the center of the stern, right off the stern.

Q. As that time had the last crewman entered the skiff or were they still in the process of loading or unloading?

A. Well, I guess I was the first one, they kept loading, there was shouting all about.

Q. Where were you taken then from the skiff, please?

(Testimony of Joe John Salmeri.)

A. To some dock there, I guess to the next dock over.

Q. Where did you go from there?

A. They put me in the French Hospital in San Luis.

Q. How long were you in this French Hospital in San Luis Obispo? A. About three weeks.

Q. And then where did you go, please?

A. Took me to the Monterey Hospital.

Q. How long were you at the Monterey Hospital?

A. About ten days, between ten days and two weeks. [35]

Q. Now, will you please state to your knowledge the injuries that you sustained?

A. Well, by what the doctor tells me——

The Court: Do you intend to offer in evidence the hospital records?

Mr. Vartan: Yes, your Honor.

The Court: Or will you have a stipulation on it?

Mr. Vartan: Well, we just as well—may just as well cover them all. I have the French Hospital bill that is located in San Luis Obispo, that was in the nature of an emergency, and I think it will be stipulated the closest Marine Hospital was in San Francisco.

The Court: How far is San Luis away?

Mr. Whelan: About 250 miles.

The Court: 250 on the way to Los Angeles?

Mr. Whelan: Correct, just about half way.

Mr. Vartan: Down the Coast Highway.

(Testimony of Joe John Salmeri.)

The Court: Can you stipulate this bill is reasonable in amount?

Mr. Silvers: We haven't seen it, your Honor.

The Court: I suggest you do this: I suggest you let counsel look at these papers now and then you can offer them after the luncheon recess, but give them an opportunity to examine them, during recess.

Mr. Vartan: Very well. [36]

The Court: You can look at them during recess.

Mr. Vartan: All right.

The Court: You went to the French Hospital at San Luis there and for how long about?

The Witness: Three weeks.

The Court: Three weeks. Then you went to Monterey Hospital, and how long were you there?

The Witness: Between ten days or two weeks.

The Court: All right.

Q. (By Mr. Vartan): Now, you received fractures to your right arm, is that right?

A. That's right.

Q. And if I may save time I can lead the witness, you received two fractures there, the top of the forearm and two in the lower portion of the forearm?

A. That's right.

Q. Now, you were treated first in San Luis Obispo; what was done for you there?

A. San Luis—well, they gave me two operations there and placed some rods inside my arms.

Q. And how long were those rods, they extended from what to what?

A. The elbow to the forearm.

(Testimony of Joe John Salmeri.)

Q. From your elbow to your forearm? [37]

The Court: Take your coat off and let me see the operation scar. Maybe you can have placed upon the record and agree upon what the arm shows.

Appears to be an operative scar about, I'd say, five to six inches on the inner portion of the lower forearm and there is an operative scar on the back aspect of the right forearm about four and a half inches, appears to be well healed but with definite scar marks.

Any mark up on the top, upper part of your arm?

The Witness: No, it broke and they put a strap on it.

The Court: Two operative scars in his lower right forearm, no operative scars in the upper portion of this right arm.

Mr. Vartan: While he is there, your Honor——

The Court: Has that affected the contraction of your fingers to any extent?

The Witness: Yes, sir, it has.

The Court: Make a fist with your hand?

(Witness complying.)

The Court: The witness appears to be able to make a fist with his hand. Spread your hand open wide like that. (Indicating.)

It appears to be—can you spread it open any farther? [38]

The Witness: Yes, sir.

The Court: Appears to be a limited ability of extension of the fingers and spreading out of his

(Testimony of Joe John Salmeri.)

fingers of his right hand with a distinct elevation of the middle finger.

Can you bring that down?

The Witness: Yes, sir.

The Court: He is able to contract it, but at rest—now, raise it up, slowly now, like this, with your fingers. Appears to be otherwise able to extend his fingers and to contract them.

All right, sit down, sir.

Any objections to the Court's observations?

Mr. Vartan: No, your Honor.

Mr. Silvers: I have no objections.

Mr. Nave: No, your Honor.

Q. (By Mr. Vartan): Now, the rods that were inserted there at the San Luis Obispo Hospital you said ran from your elbow to the wrist, is that right?

A. Yes, sir.

Q. Now, how long, approximately, did those rods remain in your arm?

A. Seven months to a year, I don't know if it was a year or seven months.

Q. You are not sure? [39]

A. No, I never looked it up to make sure of it.

Q. If I were to tell you this accident happened September 28, that one rod was removed in January, the following January and the other rod was removed in April of the following year, would that fit in with your memory?

A. Yes, it was about two or three months after when the second one was.

Q. I see. Now, I think you said there were two

(Testimony of Joe John Salmeri.)

operations. Can you tell the Court what the first operation was as compared to the second operation at San Luis Obispo?

A. Well, as far as I know they operated here on the top of my forearm and over here (indicating). Two days later or three days later, I am not sure, they operated underneath my arm and placed another rod under there.

Q. I see.

A. And put my hand—I don't know what you call it, these weights.

Q. Traction? A. Traction.

Q. Mr. Salmeri, did you receive any other injuries besides the ones you have——

A. Broken shoulder.

Q. Pardon me? A. Broken shoulder.

Q. On which side, please? [40]

A. My right side.

Q. Can you tell us briefly what was done for your shoulder?

A. Well, they kept me in one position for, oh, about, I guess, two and a half weeks with a strap—I don't know if they had a strap or not, no, just one position for about two weeks.

Q. Now, do you have any difficulty with your shoulder at this time?

A. It bothers me at times.

Q. Well, tell us just how and in what respect it bothers you.

A. Well, if I try to exercise it I always get a click in there and the more I do it I keep—begins

(Testimony of Joe John Salmeri.)

to start hurting after and there are times just like I feel a sharp pain in there and times, though, I don't feel anything on it.

Q. And you're pointing to your right shoulder and you're pointing to the point where the fracture was? A. That is right.

Q. Is that where you feel the discomfort or the pain?

A. That's right, right in here (indicating).

Q. Since the accident, Mr. Salmeri, does the appearance of your shoulder bone in that area on the right side, the fractured side, differ from the other side?

The Court: Fracture of his collar bone, the clavicle? [41]

Mr. Vartan: Yes, your Honor.

The Court: All right.

Q. (By Mr. Vartan): Is there any protrusion of the bone after it healed?

A. Well, I feel a bone sticks out on me compared to this side, this bone here.

Q. The right side? A. That's right.

The Court: How much were you receiving aboard the ship, what were your wages?

The Witness: Oh, I was on a salary, your Honor; usually work on a share basis, and I received a check after—I am not quite sure, I think about \$126.00.

The Court: For your three weeks work?

The Witness: Actually worked about two weeks.

(Testimony of Joe John Salmeri.)

The Court: What?

The Witness: We actually worked about two weeks.

The Court: Did you sleep aboard ship?

The Witness: Yes, your Honor.

The Court: You got your food?

The Witness: Yes, your Honor.

The Court: When did you go back—what are you doing now?

The Witness: I work for the Fisherman's Union and they give me a—we call it a patrolman's job. A fishing [42] boat comes to the cannery, I go check the weights, represent the fishing boats—represent the Fisherman's Union and bring that into the union.

The Court: How long have you been doing that?

The Witness: I think I started about eight months or a year after the accident.

The Court: What did you do in the intervening time? How long was it before you went out again to sea?

The Witness: I haven't been out to sea, your Honor.

The Court: When did you go to work after this accident?

The Witness: I haven't been to work, this is the only thing I have been doing.

The Court: The only job you had?

The Witness: Yes, sir.

The Court: That started about when?

(Testimony of Joe John Salmeri.)

The Witness: Well, two years and two months ago I got that job.

The Court: How long after September, '54, was it that you went to work for the Fisherman's Union?

The Witness: Oh, about eight months, maybe it was a year.

Q. (By Mr. Vartan): During the interim before you got this job with the [43] Union you had no work whatsoever, is that right, from the time of the accident until you went to work for the Union?

A. No, sir.

Q. All right. Now, your right arm—are you able to extend your arm and turn your arm in this fashion? (Indicating.)

Turn to His Honor, please. Is that all you can do? A. Yes, sir.

Q. Show what you can do with the left.

A. (Witness demonstrating.)

Q. Now show the right.

The Court: Appears to be at least 50 to 70 per cent limitation on the turning of the arm.

Mr. Vartan: Yes.

The Court: Extension.

Mr. Vartan: Extension of the arm and turning the palm upwards is limited.

Q. (By Mr. Vartan): You can sit down. Do you have any pain at the present time in that arm?

A. Always have a pain in it.

Q. Always have pain? A. Yes, sir.

Q. And you have been told, have you not, that

(Testimony of Joe John Salmeri.)

there is one fracture that hasn't healed even today and it is held [44] together with a rod, is that right?

A. Yes, sir.

Q. And you have been told it would require a bone graft operation for that fracture that hasn't healed in that arm, is that right?

A. Yes, sir.

Q. Why haven't you returned to your occupation as a fisherman, please?

A. Because I can't do it any more.

Q. Now, by the way, in your occupation as a fisherman did you ever go up to Alaska?

A. Yes, sir.

Q. That's a lucrative field in the fisherman's business?

A. Yes, sir.

Q. Up there how do you use your arm, your right hand and left hand in fishing for salmon in Alaska?

A. Use both hands and we use them a lot to take the fish out of the net, with hooks you do that.

Q. I see. And do you feel you are able to use that right hand?

A. No, sir.

Q. I have asked you before we came to court to estimate the earnings for a period of five years prior to 1954 and you have told me, have you not, that your average earnings prior to this accident was \$4,000.00? [45]

Mr. Silvers: Just a moment, I don't think——

A. Yes, sir.

Mr. Silvers: ——this should be limited——

(Testimony of Joe John Salmeri.)

The Court: Yes, objection sustained.

Mr. Vartan: I thought you would be a little more tolerant.

The Court: Perhaps you have his income tax returns that you could show counsel during the recess.

Mr. Vartan: Very well.

The Court: His employment slips and you might get a stipulation that would show what taxes were deducted.

Mr. Vartan: All right. Well, if I may at this point——

The Court: Assuming his employer deducted taxes and filed the usual returns.

Mr. Vartan: Dealing with fishermen, your Honor.

The Court: Well, show counsel what you have.

Mr. Vartan: Yes. I have some figures, the exact earnings, but at any rate your average earnings were what in five years prior to this accident?

A. About \$4,000.00.

Q. All right. Now, in 1955——

The Court: What are you getting now?

The Witness: Your Honor, we figured an average about, maybe about \$50.00 a week. [46]

The Court: Well, do you get expense money, too, in his job?

The Witness: When they send me down south to Port Hueneme they give me expense when I go down there.

(Testimony of Joe John Salmeri.)

Q. (By Mr. Vartan): In your present job you do not use the right arm; is that true?

A. Just write.

Q. I see. Now, when you returned to work in 1955, eight months after this accident, what was your salary? A. \$1,100.00.

Q. That was for the remaining of 1955, is that correct? A. That's right.

Q. Now, in 1956 what was your total income?

A. Somewhere around \$2,600.00.

Q. And currently I believe His Honor covered it, so I think that is all. You may cross-examine.

Cross-Examination

By Mr. Nave:

Q. Mr. Salmeri, if I understood your testimony correctly this morning and if I am wrong, correct me, you stated you had been on the fishing boat Santa Lucia about two weeks before this explosion?

A. Two to three weeks. [47]

Q. Two to three weeks? A. Yes, sir.

Q. Had you ever worked on that fishing boat before? A. No, sir.

Q. You hadn't been aboard the ship before?

A. No, sir.

Q. Where were you hired to go on the Santa Lucia?

A. They called up from Frank, from Frank's house.

Q. Where, sir?

A. He called me at my house.

(Testimony of Joe John Salmeri.)

Q. No, no, I mean what town?

A. In Monterey, sir.

Q. In Monterey? A. Yes, sir.

Q. And then when you went to work there the first time two to three weeks before this explosion, did you go right out to sea or did you work on the fishing boat?

A. No, sir, I went right out to sea.

Q. You went right to sea? A. Yes, sir.

Q. From Monterey? A. Yes, sir.

Q. And where did you go?

A. Went straight to Avila.

Q. Right in that vicinity, you mean? [48]

A. Yes, sir.

Q. Then during the next two or three weeks were you constantly on the fishing boat?

A. Yes, sir.

Q. Going out and having short fishing expeditions, is that correct? A. Yes, sir.

Q. Did you have anything to do during that two or three weeks, or at any other time, in the servicing of the fishing boat, the repairing of it?

A. Well, nets, repaired nets.

Q. On nets? A. Yes, sir.

Q. Were you aboard the fishing boat or working on it when it was repaired at Monterey?

A. No, sir.

Q. You had nothing to do with the painting of it or repairing of it or anything to do with the electrical end of it when it was being repaired in Monterey? A. No, sir.

(Testimony of Joe John Salmeri.)

Q. Now, did you state, sir, that you had never been down in the engine room of that ship?

A. Yes, sir.

Q. Now, in this fishing boat do you know the approximate length of the fishing boat? [49]

A. Well, I don't know the exact length of that one.

Q. Some 72-odd feet, isn't it?

A. 72, 78, 80, 82.

Q. Something like that? A. Yes, sir.

Q. And on the deck, above the deck, the main deck there is a galley, is there not?

A. Yes, sir.

Q. And then forward of the galley there are crew quarters? A. Yes, sir.

Q. Now, in the floor of the crew quarters do you know that there was an open place, an engine hatch that went down into the engine room?

A. Yes, sir.

Q. Now, to get into the engine room on the fishing boat, the only place you could get in the engine room was to go into the crew's quarters and go down this hatchway, is that right?

A. I don't remember now if we had a door on the outside. I knew there was one on the inside, but we had to open a door to go down into the hatch. They do that for—have a door there, somebody fall right through, so they must have had a door there on the other side, I am not sure.

Q. You are not certain about that?

(Testimony of Joe John Salmeri.)

A. No, not about the outside. I know there is one on the [50] inside.

Q. All right. But there is, you do know that there was a hatchway in the crew's quarters with a ladder that went down in the engine room?

A. Yes, sir.

Q. And you have never been down in that engine room at any time? A. No.

Q. So you are not familiar with the equipment that was below decks at all? A. No, sir.

Q. You had never seen the batteries or the electrical panels or switchboards? A. No, sir.

Q. That was below deck? A. No, sir.

Q. Did you at any time ever see this particular gasoline tank that was below deck on the fishing boat? A. No, sir.

Q. Did you ever examine it at any time?

A. No, sir.

Q. Did you know what capacity it was, how many gallons it held? A. No, sir.

Q. Now, in the galley there was a stove, wasn't there? [51] A. Yes, sir.

Q. A cook stove? A. Yes, sir.

Q. And it was on that stove that the meals of the crew and coffee and that sort of thing were prepared, is that right? A. Yes, sir.

Q. On the day of this explosion had you had coffee or anything to eat in that galley?

A. I had a coffee in the morning before we went out.

Q. Coffee in the morning? A. Yes, sir.

(Testimony of Joe John Salmeri.)

Q. Was the entire crew in there at that time having coffee, or were you in there by yourself?

A. Usually we went up there together and we usually have coffee when we get up.

Q. Now, the coffee that was prepared was customarily prepared on a stove with a burner in it, is that right? A. Yes, sir.

Q. And coffee is prepared in a rather large coffee pot? A. Yes, sir.

Q. It is put over a burner?

A. That's right.

Q. And all the meals that are prepared are prepared on that cookstove located in the galley?

A. Yes, sir. [52]

Q. Now, did you have any occasion to go into that galley any time in the afternoon of the explosion? A. Not that I remember of.

Q. Did you have any occasion to observe whether or not there was any flame—— A. No, sir.

Q. ——at the burner? A. No, sir.

Q. You made no observation of it, is that right, sir?

A. No, I don't remember when I was in there.

Q. Now, you were on the deck of the fishing boat, the Santa Lucia, when this explosion took place? A. Yes, sir.

Q. Can you tell me what part of the deck of this fishing boat you were standing or located when this explosion took place?

A. Well, as close as I can get to it, the cabin was probably about here.

(Testimony of Joe John Salmeri.)

The Reporter: A little louder, please.

The Court: Indicating about midships.

The Witness: Say about midship, starboard or port side. (Indicating.)

Q. (By Mr. Nave): What were you doing at the moment of explosion? Were you washing your hands? [53]

A. No, I was going into the galley to change my skivvy shirt.

Q. You were going into the galley?

A. Yes, sir.

Q. Were you in front of the galley door, the door that goes from the deck into the galley?

A. Right in front of the galley.

Q. Right in front of the galley. Then you felt a violent explosion then?

A. Yeah, like a boom, like a swish. I can't—it is hard to explain it.

Q. As a result of this explosion or swish that you have mentioned, you were thrown up in the air, weren't you?

Mr. Vartan: Just a moment, your Honor. We object to that question as assuming facts not in evidence.

The Court: Overruled.

Q. (By Mr. Nave): You were thrown up in the air, weren't you?

A. No, sir, I wasn't.

Q. You were not?

The Court: About what time of the day was this?

The Witness: Your Honor, I figure it was close to 6:30 somewhere.

(Testimony of Joe John Salmeri.)

The Court: In the evening?

The Witness: Yes, sir. [54]

The Court: Had you had your mess?

The Witness: No, sir.

The Court: Were you going in to eat?

The Witness: After we got done, yes, sir.

The Court: The cook was cooking up, was he?

The Witness: Well, he was supposed to be cooking. The way he explained it afterwards——

The Court: No.

The Witness: ——he didn't have the meat on.

The Court: No. Did you see whether he was cooking?

The Witness: No, sir, I didn't see him.

The Court: Was the feed good aboard the ship?

The Witness: Average.

The Court: Did you smell the cooking?

The Witness: No, sir.

The Court: Italian crew? Men of Italian origin, you had an Italian dinner, didn't you?

The Witness: Yes, sir.

The Court: Spaghetti?

The Witness: We have that on Sundays and Thursdays.

The Court: Did you smell any of the sauce being cooked at the time?

The Witness: No, sir.

The Court: All right. [55]

Q. (By Mr. Nave): Now, you heard a boom, boom, is that right?

(Testimony of Joe John Salmeri.)

A. Like a—yes, the first one was like a swish as if——

Q. And the second boom came together in a split second, didn't it?

A. Second or two, right after it.

Q. And the explosion, you say, did not throw you up in the air?

A. It probably did, the second one, that is the one I felt myself. The first one I felt my head as if, well, I don't know how to explain it, then I just felt myself like flying, that is the last thing I remember.

Mr. Silvers: I am sorry, I felt myself like what?

The Court: Going.

The Witness: Flying, I guess.

The Court: You had nothing to do with the loading of this ship at that time with gasoline?

The Witness: No, sir.

The Court: Had you ever before that assisted in taking on gas?

The Witness: Not on that boat, your Honor.

The Court: Not on that ship?

The Witness: No, sir.

The Court: Do you know whether there was another gas tank aboard this ship? [56]

The Witness: No, sir, I don't.

The Court: You know nothing about the mechanism or the layout of the gasoline tanks?

The Witness: No, sir.

The Court: Or the pipes below deck?

The Witness: No, sir.

(Testimony of Joe John Salmeri.)

Mr. Nave: Does the Clerk have the original deposition of Joseph John Salmeri that was taken on August 16, 1956?

Perhaps counsel might stipulate we have true and correct copies of the depositions that were taken on August 16, 1956, reported by——

The Court: Did you file it, gentlemen? Did you file the original?

Mr. Vartan: He took the deposition, your Honor, Mr. Nave.

The Court: I don't see it here in the file unless it is in the Clerk's office.

The Clerk: We will check the Clerk's office during the recess.

The Court: Check during the recess, please.

Mr. Nave: May we refer, gentlemen, to the copy?

The Court: Yes, go ahead.

Q. (By Mr. Nave): Mr. Salmeri, I call your attention to your deposition [57] that was taken in this case on the 16th of August, 1956. You remember that time you came to my office?

A. Yes, sir.

Q. And Mr. Whelan was there and I asked you some questions about this explosion?

A. Yes, sir.

Q. I call your attention, sir, to page 21, counsel, beginning up here in the top. Now, if you will read——

The Court: Now, I know that it is the custom here in California to show the witness——

Mr. Nave: Yes, your Honor.

The Court: ——the statement. You may do that.

(Testimony of Joe John Salmeri.)

Would you also for the purpose of the record interrogate him and ask him, "Were you asked this question and did you make this answer?"

Mr. Nave: Very well, your Honor.

The Court: And then we will have on the record exactly what you have shown to the witness.

Q. (By Mr. Nave): Now, I will ask you at that time and place if you were not asked these questions——

The Court: One question at a time. Were you asked this question and did you make this answer at that time.

Q. (By Mr. Nave): "Question: Were these sounds like boom, [58] boom right together or was there some space between them?"

To which you answered:

"No. it seemed like they come close to me."

Did you give that answer, sir?

A. Close to me?

The Court: Yes, did you make that answer to that question?

The Witness: Yes, I did.

Q. (By Mr. Nave): The next question:

"A matter of a split second?"

"Answer: Yes."

A. Yes, sir.

Q. "Question: All right. Then you were rendered unconscious, you were knocked out, is that right?

"Answer: Well, I was in the air. I don't remember while I was in the air."

(Testimony of Joe John Salmeri.)

That's right, isn't it, sir?

A. Yes, sir.

Q. "Question: You were in the air?

"Answer: I must have been blown up about fifteen feet, I guess." [59]

A. Yes, sir.

Q. That is correct, isn't it? A. Yes, sir.

Q. So there was an explosion and you were thrown up into the air? A. Yes, sir.

Q. Now, you were rendered unconscious, you were knocked out, weren't you?

A. Yes, sir.

Q. When you came to were you still on the deck of the fishing boat or had you been taken into the launch?

A. I was on deck of the fishing boat.

Q. You were on deck. Before this explosion did you smell any gasoline any place? A. No, sir.

Q. At no time did you smell any fumes of gasoline, did you, sir? A. No, sir.

Q. And then you were taken aboard the skiff, were you? A. Yes, sir.

Q. It was at that time after you were on the skiff that you first noticed any flames, isn't that right? A. Yes, sir.

Q. That was some time after this explosion, wasn't it? A. Yes, sir. [60]

Q. And before that you hadn't seen any fire any place, had you? A. I hadn't.

Q. Now, in this explosion, Mr. Salmeri, the fishing boat was blown to pieces, wasn't it?

(Testimony of Joe John Salmeri.)

A. Well, what they told me. I didn't see it myself.

Q. You didn't see it? A. No.

Q. Did you know that the cabin had been blown completely off——

The Court: He says he didn't see it, he was taken to the hospital.

Q. (By Mr. Nave): You never looked back at the fishing boat at any time after you——

A. Just when I was lying down, the only part I seen was the stern part up in the air, the only part I could see.

Q. That is all you could see?

Mr. Vartan: When you were lying down where?

The Witness: Lying down in the skiff, when they laid me down in the skiff.

Q. (By Mr. Nave): Now, Mr. Salmeri, have you ever observed, or have you ever seen the skipper, Mr. Cardinale, putting gasoline in the tanks on the Santa Lucia? [61] A. No, sir.

Q. You never noticed him at any other place taking the gasoline hose and filling the gas tank?

A. Pretty sure I seen him get the hose when they were handing the hose down to him, that's the last I seen him, as far as I can remember.

Q. Do you remember how far, how long before this accident, this explosion it was that you saw Mr. Cardinale take a hose and put gasoline in the gas tank?

Mr. Vartan: Just a minute, your Honor. We object to that as assuming something not in evi-

(Testimony of Joe John Salmeri.)

dence. The man says the last he remembers Mr. Cardinale took the gas hose. Now counsel says when you saw him——

The Court: Objection sustained.

Mr. Nave: I apologize to your Honor and counsel, I perhaps misunderstood him. I thought he said he had seen him do it prior.

The Court: Ask him. Had you seen Cardinale take gasoline aboard this ship before?

The Witness: No, sir.

Q. (By Mr. Nave): You had not. My mistake. I misunderstood you. So on this particular day of this explosion was the first and only time that you ever saw Mr. Cardinale put gasoline into the fishing boat, is that right? [62]

Mr. Vartan: Just a minute. We object to that, your Honor. He didn't testify even on this particular day that he saw Mr. Cardinale put gasoline in. I don't know why counsel persists.

Mr. Silvers: We join in the objection.

The Court: Objection sustained. Where were you on the ship when the ship pulled up to this dock?

The Witness: I was on the side of the boat helping, I had a line ready to wrap around the pilings.

The Court: You're assisting in the docking?

The Witness: Yes, your Honor.

The Court: Did you observe what went on after that?

Mr. Nave: Thank you, your Honor.

Q. (By Mr. Nave): So that there will be no

(Testimony of Joe John Salmeri.)

mistake about this, you did not at any time see Mr. Cardinale receive the gasoline hose, is that right?

A. I seen him get the gasoline hose, yes.

Q. All right. What did you see him do with the gasoline hose on the day of this explosion?

A. That's all I seen him, just handed down the hose, he grabbed it, that is all I seen.

Q. You saw someone pass it down to Mr. Cardinale and Mr. Cardinale got it in his hands? [63]

A. Yes.

The Court: And by Cardinale you mean the owner of the ship?

The Witness: Yes, sir.

The Court: What's his first name?

Mr. Nave: Frank.

Mr. Vartan: Frank.

The Court: We have so many Cardinales here. Is that Francisco Cardinale?

Mr. Nave: Frank, your Honor.

Mr. Silvers: There is a Francois Cardinale.

The Court: All right. This is Frank?

The Witness: Yes, sir.

Q. (By Mr. Nave): Now, you had an arrangement, as I understand your testimony, to work on this fishing boat on a share, is that right?

A. Yes, sir.

Q. You were supplied your food while you worked there, you got that, didn't you?

A. No, sir, we paid our own food.

Q. That was taken out of your share?

A. Take it out of the share, out of the gross.

(Testimony of Joe John Salmeri.)

Q. And if I understood you correctly you had worked there for about two or three weeks on this fishing boat on local [64] fishing, short trips out, and you received some money for that, didn't you?

A. Yes, sir.

Q. How much had you received?

A. I think my check was about \$126.00.

Q. \$126.00? A. Yes, sir.

Q. Out of that your share for the food had been deducted?

A. Had been deducted, yes, sir.

Q. And did that also include deduction for maintenance of the fishing boat, fuel and that sort of thing, gasoline, or do you know?

A. Fuel was taken out.

Q. Fuel was taken out. All right. And then after this accident, explosion, you were in the hospital for a number of months and you went to work for the Fisherman's Union, is that correct?

A. Yes, sir.

Q. You have been working for them ever since, is that right? A. Yes, sir.

Q. And you still are employed there?

A. Yes, sir.

Q. By the Fisherman's Union. I believe you stated that your average earnings are about \$50.00 a week there and have [65] been?

A. Yes, sir.

Q. Now that \$50.00 a week, is that after they deduct the income tax and withholding and that sort of thing, or is that the gross?

(Testimony of Joe John Salmeri.)

A. No, that would be net.

Q. Is that net or gross?

A. That would be net.

Q. That is what you take home, \$50.00 a week?

A. I am judging by the average, I am not sure.

Q. I understand.

The Court: How many deductions—you're married and got two children, any more?

The Witness: That's all, your Honor.

The Court: You got four deductions.

The Witness: Yes, sir.

Mr. Nave: I have no further questions of this man.

The Court: Well, suppose we take our luncheon recess at this time. How is half past one, gentlemen?

Mr. Vartan: I want to make one observation, your Honor, so that I am not more guilty than I appear now, and that is we have one witness—we expected to read some depositions, frankly, your Honor, we didn't know your Honor's views on [66] that.

The Court: We will hear that witness this afternoon. If we have to stay later we will finish that witness' testimony.

Mr. Vartan: Well, it will be very short, I think.

The Court: Don't hurry him. We will sit here until we hear it.

Mr. Vartan: All right.

The Court: Half past one.

(Testimony of Joe John Salmeri.)

(Whereupon, the Court adjourned until 1:30 o'clock p.m. of this date.) [67]

September 3rd, 1957—1:30 P.M.

The Court: Had you completed your cross-examination of this witness?

Mr. Nave: Yes, Judge. Just one moment. Mr. Whelan, will you step up here, please? This isn't on the record.

Mr. Silvers: Am I invited, too?

Mr. Nave: Why, sure.

Mr. Vartan: May I come?

Mr. Nave: You are all welcome.

(Counsel approaching the bench and having colloquy with the Court out of the hearing of the Reporter.)

The Court: Had you completed your cross-examination of this witness?

Mr. Nave: I had.

Mr. Silvers: We have also looked at these hospital records, your Honor, during the recess and we have no objection to having them admitted.

The Court: Received in evidence. Do I take it that that consent also embraces a stipulation that the hospital charges are reasonable in amount?

Mr. Nave: I will so stipulate. [68]

Mr. Silvers: Yes. We reserve, however, any right with respect to the establishment of the availability of the Marine Hospital facilities.

(Testimony of Joe John Salmeri.)

The Court: Well, apparently you have conceded there was no Marine Hospital within a hundred miles.

Mr. Silvers: I think that is right.

The Court: It seems this is emergency treatment and therefore the man was entitled to go to a private hospital.

Mr. Silvers: Initially I am quite sure that was the case.

The Court: However, you may submit any evidence on that aspect of the case.

Mr. Nave: In reference to the hospital records, your Honor, the one that we are concerned with, I agree, only appertains to Mr. Salmeri, I don't want to enter into a stipulation as to others until they are exhibited to us.

The Court: All right.

The Clerk: Libelant's Exhibit 1 introduced and filed into Evidence.

(Whereupon, the foregoing hospital records were marked and introduced into Evidence as Libelant's Exhibit No. 1.)

Mr. Silvers: Shall I proceed, your Honor?

The Court: Just two seconds. [69]

I notice next to this Exhibit are also some doctor bills. Is it conceded that these bills are reasonable in amount as listed?

Mr. Silvers: Yes.

The Court: Both sides?

(Testimony of Joe John Salmeri.)

Mr. Nave: In that particular case, yes, your Honor, as to the one Exhibit.

The Court: All right.

Cross-Examination

By Mr. Silvers:

Q. Mr. Salmeri, I am going to show you a photograph of the Santa Lucia and ask you if that correctly shows the boat as it was so far as its structure is concerned at the time of this accident.

A. The only thing is the turntable, the turntable, see, have that on? I think the turntable was off at that time.

Q. For the record when you say "turntable" what is it you are referring to?

A. This is—that is where we put our seine net, on this table back here, and it has got rollers underneath so we turn it around.

Q. That is the dark object in the sternmost part of the ship, is that right? A. Yes, sir. [70]

Q. And you are not sure whether it was in that position?

A. I think it was off completely.

Q. But with that exception does the photograph show the Santa Lucia as it was the day of the accident? A. Yes, sir.

Mr. Silvers: We will offer this in evidence, your Honor, as Respondent Cardinale Exhibit A.

The Clerk: Respondent's Exhibit A introduced and filed into evidence.

(Testimony of Joe John Salmeri.)

(Whereupon, the foregoing photograph was marked and introduced into Evidence as Respondent's Exhibit A.)

Q. (By Mr. Silvers): With respect to this photograph, Mr. Salmeri, could you show us in what portion of the boat the galley was located?

A. Well, these two windows here are—that's where the galley was. That is the starboard side of the galley.

Q. And that's the after part of the superstructure that is shown here, is that correct?

A. That's right.

Q. The door that is shown immediately above the word "Santa," that is the door that leads to what part of the boat?

A. Well, I think that's—goes right into this compartment here where there is the steering wheel and down below—and also where the bunk rooms are.

Q. Is the entrance to the galley shown on this photograph? A. No, sir.

Q. Where was it?

A. It is on the port side at the end of the cabin there.

Q. You entered the galley from the after end of this house, is that right?

A. The port side.

Q. On the port side? A. Yes, sir.

Q. Is that the door that you were headed for just before the explosion took place?

(Testimony of Joe John Salmeri.)

A. Yes, sir.

Q. So that if I understand you correctly just before the fire and explosion took place you were on the after end of the vessel on the main deck just getting ready to step into the door leading to the galley, is that correct?

A. Just previous to the explosion, yes, sir.

Q. All right. Up to the point that the explosion took place you had never actually entered the galley, is that right?

A. No, sir.

Q. And the first awareness that you had of anything unusual was while you were still outside and heard this swish? [72]

A. Yes, sir.

Q. That kind of sound, is that right?

A. Yes, sir.

Q. And did you say that you felt that in the area of your head?

A. My whole head and my face was just like sort of crumble in on me.

Q. That's where you felt the effects of this initially?

A. Yes, sir.

Q. And you were still outside the house, is that right?

A. So far as I know, yes, sir.

Q. And then the next thing you heard was a boom?

A. About a couple of seconds after I heard something like a boom, just like—felt myself going. After that I don't remember anything else.

Q. So far as the appearance of fire or flames is

(Testimony of Joe John Salmeri.)

concerned, you first saw flames when you were in the skiff after you had been removed from the fishing boat to the skiff, is that right?

A. Yes, sir.

Q. At that time you saw flames on the oil dock, is that right?

A. Yes, sir. It was right above my head—I mean, looking up.

Q. Was that the place where the gasoline and the gasoline [73] hose that was used to fuel the Santa Lucia on this occasion were located?

A. Yes, sir, so far as the area where the fire was coming from.

Q. So far as the area was concerned the fire that you saw was in the area of the gasoline hose that was used to bring the gas to the Santa Lucia on this particular day?

A. Yes, sir.

Q. At that time when you were on the skiff you observed no flames on the boat itself? Right?

A. No, sir.

Q. You have told us that the brail was being raised by hand power, is that correct?

A. Right.

Q. The reason for that is that the main engines had been cut before the boat tied up alongside this service station for gas, right?

A. No, they were cut after we tied up.

Q. Just after you tied up?

A. Yes, sir.

Q. The engines were cut, however, before you saw the gas hose handed to Frank Cardinale by the Union Oil gas attendant up on the dock; right?

(Testimony of Joe John Salmeri.)

A. Yes, sir.

Q. So the engines weren't operating at all after the boat [74] was tied up? A. No, sir.

Q. Now, I take it that with your cargo of anchovies there was a very strong odor of fish about this boat, isn't that correct? A. Yes, sir.

Q. At the time of the gassing? A. Yes, sir.

Q. That was the strongest and most predominant odor that anyone, so far as you could tell, that anyone could smell on the boat, is that right?

A. Yes, sir.

Q. And you have testified, Mr. Salmeri, that approximately 7 to 8 minutes went by from the time you heard this swish sound, followed by the boom, and the time that you found yourself aboard the skiff and saw the fire on the oil dock; is that right?

A. Yes, sir.

Q. Did you observe the Union Oil attendant who handed Frank Cardinale the gas hose at any time other than when the hose was being handed to Cardinale?

A. No, just that once I looked up and I seen him.

Mr. Silvers: I have no further questions at this time.

Mr. Nave: May I inquire if something was [75] brought out, your Honor?

The Court: Yes, sir.

Mr. Nave: May I have the Cardinale Exhibit A, the medical record?

(Testimony of Joe John Salmeri.)

Recross-Examination

By Mr. Nave:

Q. Mr. Salmeri, you received some burns in this explosion, didn't you? A. Yes, sir.

Q. What part of your body was burned?

A. Well, they say it was flash burns on my arm.

Q. You speak of your right arm there; there were flash burns on your right arm?

A. Yes, sir.

Q. How were you dressed at the time? Did you have a jacket on or a shirt or were you in a T-shirt? Just how were you?

A. A skivvy shirt, T-shirt.

Q. T-shirt? A. Yes, sir.

Q. Is that the shirt that has a short arm down maybe three or four inches from the shoulder——

A. Yes, sir.

Q. ——and then your arm is bare underneath that? [76] A. Yes, sir.

Q. And you got these flash burns on your right arm? A. Right arm.

Q. Any place else? A. Not that I know of.

Q. Did you get any in your face?

A. No, sir.

Q. Or any part of your—— A. No, sir.

Q. ——part of your body? A. No, sir.

Mr. Nave: May I have that photograph that Mr. Silvers produced in evidence, your Honor? Thank you.

(Testimony of Joe John Salmeri.)

Q. (By Mr. Nave): Now, Mr. Salmeri, you looked at this photograph that Mr. Silvers handed you a few minutes ago. Are you familiar with the bridge or the pilot house of that ship as to where the engines can be turned off or turned on?

A. No, I have taken the wheel, but never the control.

Q. Do you know anything about how you turn off the main engine or how you start the main engine?

A. No, sir.

Q. Do you know anything about how you turn off the auxiliary engines?

A. No, sir. [77]

Q. Do you know whether or not the auxiliary engines are connected with compressors or not?

A. No, sir.

Q. Do you know whether or not they are automatic starting or not?

A. No, sir.

Q. Do you know how one would turn off the auxiliary engines?

A. No, sir.

Q. So when you stated, sir, that the engines were turned off when the ship came into the dock, what are you basing that statement on?

A. Well, if the engine is on you can hear it in the muffler.

Q. You mean you couldn't hear any sound of engines?

A. Couldn't hear no sound of anything.

Q. You didn't see anyone turn off the main engine?

A. No, sir.

Q. You didn't see anyone turn off the auxiliary gasoline engine?

A. No, sir.

(Testimony of Joe John Salmeri.)

Mr. Nave: Thank you.

Mr. Vartan: One question, your Honor. [78]

Redirect Examination

By Mr. Vartan:

Q. Where is the muffler located that you can hear if the engine is on or not?

A. It is situated—can I explain it, your Honor?

The Court: The stern of the ship, isn't it? Where the muffler usually is, or is it at the side?

Mr. Vartan: I think this is a little different, your Honor.

The Witness: It is right—behind these men is a smokestack and whenever it's on you could actually hear it, the vibration of the boat, and once that is off you know everything is off.

The Court: Protrudes through the upper deck?

The Witness: Yes, sir.

Mr. Vartan: We have no further questions.

The Court: All right, sir, thank you.

Now, you want to make that telephone call?

Mr. Nave: I would appreciate it.

The Court: We will wait here for you. May I have those hospital notes and I will make some notes from that.

Mr. Nave: Thank you, your Honor.

The Court: Are you ready to proceed? Next Witness. [79]

Mr. Silvers: I have just one question I would like to ask of this witness.

The Court: All right.

(Testimony of Joe John Salmeri.)

Recross-Examination

By Mr. Silvers:

Q. Mr. Salmeri, was the door to the galley open at the time you approached it just before this explosion? A. Yes, sir.

Q. There were portholes on both the port and starboard side of that deckhouse, were there not?

A. Yes, sir.

Q. They were open also at the time?

A. I don't remember if they were open at the time. We usually leave them open to air out, to get fresh air in there.

Q. And inside this deckhouse, you have already told us, is the hatchway which leads to the engine room below, isn't that correct?

A. In the bunk compartment.

Q. There is nothing that separates, no physical wall or bulkhead of any kind that separates the area that the portholes look onto and the galley door leads into from the hatchway leading to the engine room, is that right? A. No, sir.

Mr. Silvers: That is all. Thank you. [80]

Mr. Vartan: That is all.

The Court: Although the witness has testified that he was treated at the Monterey Hospital the hospital records introduced in evidence does not contain the Monterey Hospital records.

Mr. Vartan: Yes, your Honor. We are attempting to get those.

The Court: All right.

Mr. Vartan: We are aware of it.

The Court: Simply want to call that to your attention.

(Witness excused.)

The Court: All right. Thank you. Next witness.

Mr. Vartan: Horace Adagio, please. [81]

HORACE ADAGIO

called as a witness in his own behalf, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name.

The Witness: Horace Adagio.

Direct Examination

By Mr. Vartan:

Q. Mr. Adagio, I want you to talk slowly and if you don't understand any of the English words we use, don't be embarrassed, just speak up. Okay?

A. Yes, sir.

Q. You speak French, don't you?

A. Yes, sir.

Q. Where do you live, Mr. Adagio?

A. You mean right now?

Q. Yes. A. In San Pedro.

Q. What is your age? A. 27.

Q. What has been your occupation?

A. Fisherman.

Q. Have you had any other occupation?

(Testimony of Horace Adagio.)

A. No.

Q. That has been your work? [82]

A. All my life, yes.

Q. All your life. How long have you lived in the United States? A. Three years.

Q. Where did you come from?

A. From Algiers, North Africa.

Q. Algiers, North Africa. Were you aboard the fishing vessel Santa Lucia at the time of the fire and explosion? A. Yes, sir.

Q. Who hired you?

A. Crewman, you mean?

Q. Who gave you the job?

A. Mr. Frank Cardinale.

Q. How long were you on the Santa Lucia before this happened? A. Almost two months.

Q. Almost two months. Will you tell the Court what was your work on the boat, what did you do?

A. Crewman.

Q. What's that? A. Crewman.

Q. Crewman. Did you have anything to do with the engines? A. No, sir.

Q. Or any of the machinery on the boat?

A. No, sir. [83]

Q. Did you do any repair work of any kind?

A. No, sir.

Q. Did you operate the boat in any way at any time?

A. No, sir, just nets, fixing the nets.

Q. You just fixed the nets? A. Yes.

Q. Mr. Adagio, had you ever been in the engine

(Testimony of Horace Adagio.)

room of the Santa Lucia?

A. No, sir.

Q. Where were you on the boat when the fire and explosion took place?

A. If I can look, I can explain to you as I remember.

Q. All right. You mean you want to see the picture?

A. Yes, please. We can see from here I was on the right side, here on the right side (indicating).

Q. On the aft end of the vessel, the back end?

A. On the vessel on the—I don't know what you call it, I was just on the first side, just about right here (indicating).

Q. You were right back of the superstructure?

A. Yes, sir.

Q. The house that is on the boat?

A. Yes, sir.

Q. You were right back of that?

A. Yes, sir. [84]

Q. On the right side? A. Yes, sir.

Q. I think that is it. You were on the side of the boat away from the gas dock, is that right?

A. Yes, fronting the ocean.

Q. Yes, in other words, fronting the ocean. You were on the—well, I think we have established that.

Mr. Adagio, just before this happened, what was your position, were you standing up, sitting down, lying down, or what? A. I was standing up.

Q. You were standing up? A. Standing up.

Q. What happened to you when it happened, what happened to your body?

(Testimony of Horace Adagio.)

A. Can I show it?

Mr. Vartan: Your Honor, can he——

The Court: Surely.

Q. (By Mr. Vartan): Yes, you can show.

A. I was standing up like I am now and the front of the boat and back, I was just like I am now, and the only thing is, just sort of a big boom, and I turn around and I fall down on my knees (indicating).

Q. On both knees? [85]

A. Both knees.

Q. Now, you just showed that when you turned around, you made a complete turn to the right, is that right?

A. Yes, that is the way I did.

The Court: Half turn.

Q. (By Mr. Vartan): Half turn.

(The Court and the witness talking together in French; unintelligible to the reporter.)

Q. (By Mr. Vartan): Now, you found yourself on your two knees. What happened after that, will you tell us?

A. And I wanted to get up, but something hurt my back and I fall flat, I mean, on the deck. So when I get up, the first one is Mr. Tarantino——

Q. Talk slow. Go ahead.

A. All right. And Mr. Tarantino was on his face and pulled him into the skiff, and so I picked him up into the skiff, and I saw Cardinale, Francois Cardinale. the one that is French, he was standing

(Testimony of Horace Adagio.)

up on the skiff, because he was in the ocean when the explosion took place. So after he told me——

Q. Talk slow.

A. And Salmeri, he was crying for his arm.

Q. That's Mr. Joe Salmeri?

A. Joe Salmeri. So I grabbed him and pulled him on the [86] skiff and Mr. Tarantino and the Spanish guy, he was a crewman with us.

Q. What was his name?

A. I don't remember.

Q. Frank Pedrasaz? A. I don't know.

Q. Anyway, he was a Spanish guy?

A. Spanish guy.

Q. Okay.

A. And he was telling me what was broken right here. So I saw Mr. Romeo pull in my brother-in-law.

Mr. Nave: Your Honor, please, I am sorry, but I can't understand this.

The Court: He said he saw.

Mr. Nave: I have difficulty in understanding the witness.

The Court: Do you want to sit over here closer? You may.

You said you saw—what did you see?

The Witness: I saw Mr. Romeo pull in my brother-in-law. He was the cook on the boat.

The Court: What is your brother-in-law's name?

The Witness: Mr. Belleci.

The Court: Who is Romeo, what's his full name? Salvatore Romeo? [87]

The Witness: Salvatore Romeo.

(Testimony of Horace Adagio.)

The Court: You saw Salvatore Romeo doing what?

The Witness: Pulling my brother-in-law from the kitchen.

The Court: Pulling your brother-in-law out the kitchen?

The Witness: Yes.

The Court: Who is your brother-in-law, what was his name?

The Witness: Antoine Belleci.

The Court: Go ahead.

The Witness: So I bring to my brother-in-law to the skiff, too, so Mr. Romeo jump in the skiff and before he jump in the skiff, he said we got one man that is dead, so that remind me I got another brother-in-law on the boat, that's the one is dead now. He was laying half inside where we put the fish——

The Reporter: Wait a minute. I didn't get that.

The Court: "He was laying half inside where we put the fish"?

The Witness: Yes, sir.

Q. (By Mr. Vartan): That was your dead brother-in-law, Jack Cardinale?

A. Yes, on the boat was three brothers-in-law.

Q. Talk slower, because this man has to write down what [88] you say. If you talk fast, you know, he might forget to put everything down, so just talk a little slower.

Now, you told us, the last you said, you remem-

(Testimony of Horace Adagio.)

bered the other brother-in-law, and what happened then?

A. And Mr. Romero jump on the skiff and I was the only one, so I turn around to my brother-in-law, the one that was dead.

Q. You were the only one left on the Santa Lucia?

A. I was the last one.

Q. Yes.

A. So I took to him—I mean, I tried to talk to him to do something, you know, and then the boat goes—was just back, goes a little bit, you know—(indicating).

Q. Well, you are showing with your hands right then when you were trying to talk to your brother-in-law, you didn't know he was dead then, did you?

A. He was dead, so I saw his face, you know, he was all broken.

Q. All right. But anyway, right then you went like this with your hands (indicating), and what did you mean by that?

A. The boat was a little bit like that, so—but you know I can't tell you how many minutes it was or what, because I don't know, you know, I wasn't thinking about it, so the boat goes like that and my brother-in-law got a lot of things on top of him, so I can't pull him, so I tried to pull him and put him in the skiff, but I couldn't. [89]

Q. What did he have on his body?

A. The nets, wood, you know.

Q. In other words, his body was covered with things?

A. Yes, half.

(Testimony of Horace Adagio.)

Q. Half of the body?

A. Yes. So then the water come up on me and Mr. Romeo wants to leave, you know, he said we better go, because the thing is going to explode, you know.

Q. You are pointing like this. What did you mean when you were pointing? A. The tank.

Q. On the dock?

A. Yes. So I can do nothing any more for my brother-in-law, so I jump on the skiff and, you know, row, too, you know, to another dock, you know, to the shore.

The Court: You told us you had three brothers-in-law aboard the ship?

The Witness: With me, three; two.

The Court: Two brothers-in-law.

The Witness: Two, Antoine Belleci and Jacques Cardinale and me.

The Court: I see.

Q. (By Mr. Vartan): Now, Horace, did you see any fire any place after the fire and [90] explosion? A. Yes, sir.

Q. Where was it that you first saw any fire?

A. When I turn around to pick up Salmeri.

Q. Salmeri?

A. And so when I turn around and saw the fire on the deck, on the wharf, all of it.

Q. When you're pointing like that, you said deck. Do you mean deck or dock?

A. The dock, I mean, yes.

Q. Where the gas pump and tanks are?

(Testimony of Horace Adagio.)

A. Exactly.

Q. You saw the fire up there?

A. Up there and on top of the water.

Q. And on top of the water. A. Yes, sir.

Q. Horace, at that time did you see any fire on the Santa Lucia? A. No, sir.

Q. I know you already told the Court, it is hard for you to tell how many minutes went on during this time, but can you give us your best idea how long it was from the time that you were knocked down to your knees and until you, the last person, jumped in the skiff? A. I can't tell you. [91]

Q. You can't tell us?

A. No, the time I bring the guy on the skiff and the time, I can't figure out what time it was.

Q. All right. Mr. Adagio, were you the last one on the Santa Lucia when it started sinking?

A. Yes, sir.

Q. You were alone at that time?

A. Yes, sir.

Q. You are sure of that? A. Positive.

Q. And the reason you left your brother-in-law when you did was because the vessel was almost going under, is that right? A. Yes, sir.

Q. Will you tell us, if you recall, what part of the vessel was going down first, the front end or the back end?

A. The front, the back was the last one.

Q. The back was the last one. And you got off at the back end, of course? A. Yes, sir.

Q. When you left the boat—you were the last

(Testimony of Horace Adagio.)

one to leave—and when you left the Santa Lucia did you observe any flame or fire on the Santa Lucia just when you were leaving? A. No, sir.

Q. Later on did you see any fire in the Santa Lucia? [92] A. Yes, sir, all over.

Q. How long afterwards?

A. I think about five minutes, ten minutes, maybe.

Q. Had the skiff left the Santa Lucia when you first saw fire on the Santa Lucia?

A. Yes, sir, we were about, we row about from Salmeri to here, maybe a little bit more.

Q. All right. Mr. Adagio, during the few months that you worked for the Santa Lucia, that is, before this happened, was it fishing all the time? I mean, would it go out fishing every day for two months, or just parts of the time?

A. Yes, sir, every day.

Q. Can you tell us about what you were earning, how much money did you receive for your share per month for the two months you were on the Santa Lucia?

Mr. Nave: May I have an objection, if the Court please?

The Court: Yes, this is received subject to your motion to dismiss this libel. This man's only claim, as I understand it, is for wages.

Mr. Vartan: Yes, your Honor.

The Court: And his wages were dependent upon the total earnings of the ship, is that right?

Mr. Vartan: That's right.

(Testimony of Horace Adagio.)

The Court: You better ask him as to how his compensation [93] was measured.

Q. (By Mr. Vartan): How were you paid on the vessel, how were the crewmen paid?

A. Share.

Q. Share? A. Yes, sir.

Q. And you had one share, did you?

A. Yes, sir.

Q. And then the owner of the vessel, how many shares did he have? A. I don't know.

Q. You know you had one share?

A. I know I had one share, yes, sir.

Q. For your one share, what was your income for two months when you were on the Santa Lucia before the fire and explosion?

A. One share give me about, over one hundred, and the second one when I was on board, I think it was under thirty.

The Court: Under what?

The Witness: Under thirty.

The Court: \$130 for the two months, or for one month.

The Witness: For two months.

The Court: For two months. Let me ask you a question: Did you sign any articles aboard this ship? Did you [94] sign any shipping articles?

Mr. Vartan: I can help you, your Honor, on that.

The Witness: I don't understand.

Mr. Vartan: The vessel, the owner of the vessel,

(Testimony of Horace Adagio.)

had articles between the union and the vessel, which we have a copy of.

The Court: He had a contract with the union, but were there seaman's articles signed?

Mr. Vartan: No, your Honor.

The Court: Which bound the ship to pay this man any stipulated wages?

Mr. Vartan: No.

The Court: Or which bound this man to any particular voyage?

Mr. Vartan: No, your Honor, we have not.

The Court: So that this man could have left the ship any time it came into port, is that correct?

Mr. Vartan: Let's ask him.

The Court: I don't know, if that is so, I don't see where you have any claim here.

Mr. Vartan: Your Honor, to explain our lack of knowledge on some of these things, these men have been on the high seas, and we haven't been able—this man just came up from San Pedro and I don't want your Honor to think we have been lax. [95]

The Court: I have no such thought. I am looking at it purely from a legal point of view.

Mr. Vartan: Yes, your Honor.

The Court: If this man received as compensation by way of receiving a share of the earnings from each one of these fishing excursions which were made daily and he could have left the ship at any time, or the ship could have discharged him at any time when it came back to port and San Luis was the home port of the ship, there was no obligation

(Testimony of Horace Adagio.)

on him to stay and no obligation of the ship to keep him to the end of a voyage; therefore, I don't see how you have any claim for anything here by way of wages or lost profits.

Mr. Vartan: Well, our position, I will develop——

Q. (By Mr. Vartan): Now, Mr. Adagio, when you were hired by Mr. Cardinale, as you stated, for how long were you hired, what period of time?

A. What do you mean, hired?

The Court: Did you sign any paper?

The Witness: No, sir.

The Court: He was your brother-in-law, wasn't he? Cardinale, the owner of the ship, was your brother-in-law?

The Witness: Frank Cardinale—no, it wasn't. Jacques Cardinale was my brother-in-law.

The Court: Jacques Cardinale.

Mr. Vartan: That's a different Cardinale. [96]

The Court: That is another Cardinale.

Did you sign any paper?

The Witness: No, sir.

The Court: Did he sign any paper and give it to you when you went aboard the ship?

The Witness: No, sir.

The Court: Where was the home port of your ship, San Luis? Where did your ship sail from?

The Witness: From Monterey.

The Court: Monterey.

The Witness: Yes, sir.

(Testimony of Horace Adagio.)

The Court: How long were your trips out to sea?
Did you go out every day?

The Witness: Every day.

The Court: And come back every night?

The Witness: Every night, yes.

Mr. Vartan: Were you through, your Honor?

The Court: Yes.

Q. (By Mr. Vartan): When you were fishing in San Luis Obispo you didn't go back to Monterey every night, did you? A. No, sir.

Q. The day that this explosion took place, you had finished anchovy fishing, isn't that true?

A. Yes, sir. [97]

Q. Where was the vessel going then next?

A. To make gasoline.

Q. And after making gasoline, where were you going to go to fish? A. Sardines.

Q. When did the season start?

A. First of September.

Q. You mean October? A. October, yes.

Q. And it would last how many months, the sardine season? A. Yes, sir.

Q. How many months would it take to finish the sardine season? A. Three months.

Q. About three months.

The Court: Where would you go for the sardines?

The Witness: San Pedro.

The Court: San Pedro, California?

The Witness: Yes, sir.

(Testimony of Horace Adagio.)

The Court: And come back every night to Monterey?

The Witness: No, no.

Mr. Vartan: No, your Honor. I can understand why your Honor asked that question, being from New York, but San Pedro is way down the coast.

Counsel, how many miles would you say, about 500 [98] miles?

The Court: Down below Los Angeles, isn't it?

Mr. Vartan: Yes, your Honor.

The Court: I have been there.

Mr. Nave: Monterey is approximately halfway, so it is about 200 miles from Monterey.

Mr. Vartan: I might state for the record and ask your Honor to reserve your feeling on the subject, Mr. Zaches, who is familiar with this situation, being from Monterey, tells me that a union agreement was executed on behalf of all fishermen which the owners and operators of the vessels signed and the union, of course, signed on behalf of the fishermen, which has specific provisions, we feel, in the nature of a charter or in the nature of an employment contract, that they cannot fire a man after the season starts, and so forth, so we intend to go into that at the latter part of this trial.

The Court: All right.

Q. (By Mr. Vartan): Mr. Adagio—

Mr. Vartan: All these questions, your Honor, for the record, are on behalf of the death case.

The Court: On behalf of his own claim, have you shown that he tried to get a job as a fisherman?

(Testimony of Horace Adagio.)

Have you shown he has tried to get other work as a seaman?

Mr. Vartan: Well, we will develop that. [99]

The Court: Isn't he under any obligation to minimize damages, or do you claim he can sit on the beach for three months and draw his wages?

Mr. Vartan: No, that is what I say, we were going to defer that phase of it.

The Court: All right, but you have him on the stand here, you better ask him that question now.

Mr. Vartan: All right.

Q. (By Mr. Vartan): What did you do after, when did you first work after the Santa Lucia was sunk? A. About two or three weeks after.

Q. About two or three weeks afterwards; and for whom did you work?

A. For Mr. Romeo.

Q. Sal Romeo? A. Sal Romeo.

Q. Where did you work?

A. Santa Barbara. We met and we go to San Pedro.

Q. What did you fish for? A. Sardines.

Q. Did you earn more or less than you were earning on that Santa Lucia

Mr. Nave: Object to that as being too speculative. No foundation for that at all. [100]

Mr. Vartan: All right.

The Court: By your comments you have withdrawn your question?

Mr. Vartan: Yes, Your Honor.

(Testimony of Horace Adagio.)

Q. (By Mr. Vartan): Jacques Cardinale, you testified, was your brother-in-law, is that right?

A. Yes, sir.

Q. And his wife, Marie, is your sister?

A. Yes, sir.

Q. Where does she live, please?

A. In Algiers.

Q. In Algiers. Did you come to this country the same time that your brother-in-law Jacques did?

A. Yes, sir.

Q. Now, before coming to this country with Jacques, did you live near Jacques and your sister-in-law (sic)?

A. Yes, sir.

Q. Your mother here, and Jacques and Marie right next door?

A. Yes, sir.

Q. And is that the way they lived ever since they have been married?

A. Yes, sir.

Q. How many children did Jacques and your sister Marie have? [101]

A. Two.

Q. What are their ages, please?

A. Girl is 13.

Q. And the boy?

A. About 10 or 11.

Q. I see. Had Jacques ever been married before?

A. Never.

Q. Has your sister married since Jacques' death?

A. Never, no.

The Court: How old is your sister?

The Witness: 44.

The Court: How old was Cardinale?

The Witness: 47.

(Testimony of Horace Adagio.)

Q. (By Mr. Vartan): What did your brother-in-law Jacques do for a living in Algiers?

A. Run a boat; he had his own boat.

Q. He had his own boat. When he came to this country, did he sell his boat? A. No, sir.

Q. He kept it? A. Yes, sir.

Q. Then he intended going back, is that right?

A. Yes, sir.

Q. When he had his own boat, I assume he was also a [102] fisherman? A. Yes, sir.

The Court: How long was he here in the United States before he died?

The Witness: Some time in May.

The Court: That's three years?

The Witness: Yes, sir.

The Court: Any evidence that he sent any money back home?

Mr. Vartan: Yes, we have taken the witness' deposition, Your Honor.

The Court: All right.

Q. (By Mr. Vartan): Did you ever work with your brother-in-law Jacques in Algiers on his boat?

A. No, sir.

Q. I see. What size boat did he operate in Algiers?

A. It is different from here over there. About—smaller than this one.

Q. Let me get at it this way: How many men did he have working for him on his boat when he went fishing? A. Ten men.

(Testimony of Horace Adagio.)

Q. And in the old country, Horace, did they do the same as we do here, work on a share basis?

A. Yes, sir, on share. [103]

Q. And you're familiar with the custom there as it is here, the owner of the boat has more than one share, is that right?

A. Yes, sir.

Q. When you were there living next door to him, did he provide your sister and the children with a good home?

A. He was a good man.

Q. Pardon me?

A. He was a good man.

Q. He was a good man?

A. Yes.

Q. Was he good to his children?

A. Yes, sir.

Q. And good to his wife?

A. With everybody, sir.

Q. Did you ever see your brother-in-law go and take the children to church?

A. Yes, sir.

Q. How often?

A. Every Sunday when he can.

Q. When he wasn't out to sea, is that right?

A. Yes, sir.

Q. How about your brother-in-law's health, so far as you know, was he a good, healthy man?

A. Yes, sir.

Q. And do you ever remember during the times you lived [104] next door to him where he was sick for any length of time?

A. Never.

Q. Can you give us any idea, Horace, as to how much per share or how much the average fisherman earned in Algiers?

(Testimony of Horace Adagio.)

Mr. Nave: I am going to object to that question, if the Court please, as being——

Mr. Vartan: I know it is speculative.

The Court: Ask him if he knows and let him answer. Objection overruled.

Mr. Vartan: Just want to get an idea.

Q. (By Mr. Vartan): What did the fishermen earn in Algiers in the fishing business? How much a month, how much money?

A. It is like here, one week you get a lot of fish——

The Court: When you got a lot of fish you don't get too much money for the fish, right?

The Witness: Yes, sir.

The Court: When you haven't got a lot of fish, you don't make too much because you got no fish to sell; right?

The Witness: Yes, sir.

The Court: Did I understand you to say that for the two months you worked on the Santa Lucia, your total share was \$138?

The Witness: Yes, sir, he give me two checks.

The Court: Two checks; how much? [105]

The Witness: A hundred and twenty, ten and thirty.

The Court: Together, how much?

The Witness: Two hundred and fifty.

The Court: Two fifty? Not a hundred and thirty-eight?

The Witness: No, just one check.

The Court: One check for \$138?

(Testimony of Horace Adagio.)

The Witness: A hundred and thirty-eight; I don't remember now.

The Court: The other check how much?

The Witness: A hundred and ten.

The Court: Okay.

Q. (By Mr. Vartan): The sardine season was very good following the accident, wasn't it?

Mr. Nave: I object to that question, if the Court please.

A. Yes, sir.

The Court: Well, we will leave it. Overruled. There is no evidence as to what is good, you don't ask him that, but just leave it.

Mr. Vartan: It is so hard to pin down, depends on the vessel.

The Court: That's all right.

Mr. Vartan: I think that's all, your [106]
Honor. Your Honor has the earning picture.

Cross-Examination

By Mr. Nave:

Q. Mr. Adagio, you have testified that you were not familiar with the engine room on the Santa Lucia at all, you had never been in the engine room?

A. No, sir.

Q. You don't know anything about how you turn the engines on or off, or the motors on or off?

A. No, sir.

Q. Never seen the gasoline tank that was on this fishing boat? A. No, sir.

Q. At no time? A. No.

(Testimony of Horace Adagio.)

Q. You have never done any work on the boat in the way of repairs or painting or anything like that?

A. No, sir.

Q. Were you on the fishing boat when it was being repaired at Monterey before this fishing season?

A. No, sir, nothing was repaired.

Q. Nothing was repaired.

A. It was repaired.

Q. It was repaired?

A. We put just the nets. [107]

Q. Well, do you remember when the Santa Lucia was being painted?

A. No, sir, I wasn't there.

Q. You weren't there. Do you remember when the engines were being worked on and the electricity was being worked on?

A. No, sir.

Q. You weren't on the ship at that time?

A. No, sir.

Q. The only thing you had anything to do with repair was the nets, is that right?

A. Yes, sir.

Q. Now, the morning of this explosion, you had been out to sea fishing, hadn't you?

A. Yes, sir.

Q. What kind of fish did you get that day?

A. Anchovies.

Q. Anchovies?

A. Yes, sir.

Q. When you came back from the anchovy fishing, you went to another wharf, not this one, but another one that was nearby, didn't you?

A. Yes, sir.

Q. Do you remember about what time of day it

(Testimony of Horace Adagio.)

was that you went to the other wharf with the anchovies?

A. It was in the afternoon, about 2:00 o'clock afternoon. [108]

Q. About 2:00 o'clock in the afternoon. You and the crew had caught some anchovies that morning, you had anchovies did you?

A. On the boat, yes, sir, we catch them.

Q. You unloaded the anchovies at the other dock? A. Yes, sir.

Q. That's right. And then after unloading the anchovies—about 2:00 o'clock in the afternoon, is that right?

A. Then we get in 2:00 o'clock in the afternoon.

Q. Yes.

A. After we unload the fish it was about 3:45 o'clock.

Q. Then you left the other dock in the Santa Lucia? A. Yes, sir.

Q. And the ship went out to sea again, didn't it?

A. Yes, sir.

Q. Do you know why it went out to sea, what it was doing out there after it took the anchovies off?

A. Yes, sir.

Q. What was it doing?

A. Just clean up the boat.

Q. Clean up the boat? A. Yes, sir.

Q. And then while it was out at sea you could hear the main engine going, the main engine make noise? A. Yes, sir. [109]

Q. Did you notice it when it was on, could you

(Testimony of Horace Adagio.)

tell it was making a noise? A. Yes, sir.

Q. Then it came back to the Union Oil dock, is that right? A. Yes, sir.

Q. About what time was it when it came back to the Union Oil dock?

A. How can I tell you; 30 minutes after, maybe more.

Q. Around 6:00 o'clock? 5:30, 6:00 o'clock?

A. 5:30, 6:00 o'clock, yes, somewhere.

Q. Somewhere. All right. Where were you when the fishing boat Santa Lucia pulled into the dock, where were you standing when it came into the dock? Do you know what I mean? A. No, sir.

Mr. Nave: May I have that photograph, please?

Q. (By Mr. Nave): As the fishing boat came into the Union Oil dock to make gasoline——

A. Yes, sir.

Q. ——where you were you on the boat then?

A. Right here (indicating).

Q. You were standing on the stern, the right-hand side?

A. Yes, behind what you call, you know, the little boat, the little boat—— [110]

Q. The skiff?

A. No, no, not the skiff, it was—I mean, behind the—what you call that?

Q. Behind the galley? A. Yes.

Q. Behind the galley.

A. On the right side.

Q. On the right-hand side? A. Yes.

Q. What were you doing there?

(Testimony of Horace Adagio.)

A. Like all crewmen, you know, we try to, you know, some of the men tied up the boat, and some men, we clean up the boat, the brail, we got a big brail, sardines was inside.

Q. Did you help to tie the boat up?

A. No, sir.

Q. What were you doing when the fishing boat came into the——

A. I was holding the brail.

Q. Holding up what?

Mr. Vartan: He said it, the brail.

Mr. Nave: The brail. All right.

Q. (By Mr. Nave): Did you notice what Mr. Cardinale, the skipper, did when the Santa Lucia came into the Union Oil dock?

A. No, sir.

Q. Did you see him at any time before that explosion? [111]

A. No, sir.

Q. With the gasoline hose?

A. No, sir.

Q. You didn't see him at all?

A. No, sir.

Q. Did you hear the conversation between the skipper, Mr. Cardinale, and a man up on the top of the Union Oil dock?

A. No, sir.

Q. You didn't hear him say anything to the Union Oil man or Union Oil man say anything to him?

A. No, sir.

Q. No conversation?

A. No conversation.

Q. All right. Do you know how long you had been tied up at the dock before this explosion took place?

A. I can't tell how long.

Q. Ten minutes? Something like that?

A. Ten minutes.

Q. Around ten minutes, would you say?

(Testimony of Horace Adagio.)

A. Well, ten minutes—I can't tell you exactly, because I don't work with a watch, not the crewmen.

Q. But around ten minutes, is that about right?

A. Yes, I think so.

Q. Did you smell any gasoline at any time during that ten minutes that you were at the dock before the explosion? [112]

A. No, sir.

Q. Did you see any gasoline leaking any place?

A. No, sir.

Q. Did you see any gasoline leaking down from the timbers on the dock?

A. No, sir.

Q. Did you see any gasoline spilled on the fishing boat before the explosion?

A. No, sir.

Q. You had started to go into the galley just before the explosion, is that right?

A. No, kitchen?

Q. Kitchen?

A. No, I don't get in the kitchen, I just stand up on the brail, I was holding it.

Q. I see. What way were you facing, what way were you standing when the explosion took place?

A. I have to show you again.

Q. All right.

A. (Indicating). It was the bar.

Q. Well, this is the dock, this is the gasoline dock here. Now, which way were you facing, facing towards the dock or facing the opposite side?

A. I tried to explain to you. This is the dock.

Q. This is the dock? [113]

Mr. Vartan: Excuse me. Why don't you show

(Testimony of Horace Adagio.)

him the diagram; "this" and "that" won't mean anything.

Mr. Nave: All right, I think that is a good suggestion.

Q. (By Mr. Nave): You see this sketch here that shows the Santa Lucia? A. Yes.

Q. That represents the fishing boat.

A. Yes, sir.

Q. And this represents where the gasoline was on the dock. A. Yes, sir.

The Court: Is that a sketch that has been marked in evidence yet?

Mr. Vartan: Not yet, your Honor.

The Court: Don't you think you should put it in evidence?

Mr. Vartan: Yes, your Honor.

The Court: Do you want it in evidence?

Mr. Vartan: Yes, we offer it in evidence.

The Court: Any objection?

Mr. Nave: For illustrative purposes we have no objection. I will call your attention that we do contend that the position of the tug Avila as shown on the sketch is not correct, that it actually was back some distance towards this other offset, but as being representative of the general [114] situation as to the fishing boat and the dock——

The Court: With that understanding then, it is received in evidence as Libelant's Exhibit——

The Clerk: 2 your Honor.

The Court: ——2.

(Testimony of Horace Adagio.)

(The sketch of the fishing boat Santa Lucia was marked Libelant's Exhibit No. 2 in evidence.)

Q. (By Mr. Nave): Now, referring to Plaintiff's Exhibit 2, the Santa Lucia is represented there as the fishing boat? A. Yes.

Q. And you understand this is the service station dock here? A. Yes, sir.

Q. All right. Now, as I understand it, you were on this side of the Santa Lucia, is that right?

A. Yes, sir.

Q. On the opposite side.

A. This is the bar here, the net is here, and the crewmen are here. I was on the right side here.

Q. Just mark with an X with a pencil where you were standing.

A. Yes, sir, I stand the right side, right here.

The Court: Put a little X there and put your initials there.

Mr. Nave: I may draw a line out with a [115] circle, your Honor, so we can see it. And just put your initials right there, if you will, please, just initial this at the end of the mark.

The Witness: What is initial?

The Court: Letter, name.

(Witness writing.)

Q. (By Mr. Nave): Now, you were in a position marked on the exhibit here, at this point?

A. Yes, sir.

(Testimony of Horace Adagio.)

Q. What way were you facing when the explosion took place? A. Facing the front.

Q. Were you facing this direction (indicating)?
A. No.

Q. Were you facing——

The Court: Indicating the stem of the ship.

Mr. Nave: The stern of the ship?

The Court: Stem.

Mr. Nave: Stem, the after part.

The Court: The fore part.

Q. (By Mr. Nave): And you felt an explosion, didn't you? A. I beg your pardon?

Q. Do you know what an explosion is?

A. Yes. [116]

Q. Did you feel an explosion at that time?

A. I just heard the big boom, that's all.

Q. You heard a big boom? A. That's right.

Q. You heard one big boom, is that right?

A. Right.

Q. Or was there more than one big boom?

A. That's what I heard, boom, and I was on my knee, that is all I can tell you.

Q. As a matter of fact you did hear just one big boom, didn't you? A. Yes, sir.

Q. That's true, isn't it? A. Yes.

Q. Just one big boom? A. One big one.

Q. And that knocked you down on your knees, didn't it? A. Yes, sir.

Q. Did you fall forward the way you were facing toward the front of the boat? A. Yes, sir.

Q. You fell down on both knees?

(Testimony of Horace Adagio.)

A. Both knees.

Q. Then as I understand it, you were then turned around? A. Yes, sir. [117]

Q. To your right? A. Yes, sir.

Q. You turned around completely so you then were facing the stern or the back part of the fishing boat?

A. I was like that and I was exactly like this, that is all I can tell you (indicating).

Q. Fine, thank you. Now, you didn't see any fire any place before this one explosion you heard, did you? A. No, sir.

Q. There was no fire that you saw either on the ship or on the dock before this big boom?

A. No, sir.

Q. Then you got up from your knees and you helped somebody to a skiff, didn't you?

A. Yes, sir, Mr. Tarantino.

Q. Mr. Tarantino? A. Yes, sir.

Q. Where did you find Mr. Tarantino? Where was he, Mr. Tarantino, when you found him?

A. When I got up he was just in front of me, about like that. He had blood on his face.

Q. Was he on the same side?

A. Just right here; I was here and he was in front of me.

Q. He was in front?

A. In front of me. [118]

Q. You assisted him into the skiff?

A. Yes, sir.

(Testimony of Horace Adagio.)

Q. Then what did you do next after you helped Mr. Tarantino into the skiff?

A. I helped Salmeri (indicating).

Mr. Vartan: Pointing to the man who just testified.

Q. (By Mr. Nave): Mr. Salmeri?

A. Yes, sir.

Q. Where was Mr. Salmeri when you assisted him, where did you find him?

A. He was behind Mr. Tarantino, flat, crying for his arm.

Q. Was he lying down? A. Yes, sir.

Q. He was holding his arm? A. Yes, sir.

Q. Then you assisted him into the skiff?

A. Yes, sir.

Q. All right. Now, the first fire that you ever saw was several minutes after this boom, this explosion, wasn't it?

A. When I bring Mr. Tarantino, I have to turn back to pick him up, that is when I saw the fire.

Q. After you put Mr. Tarantino in the skiff?

A. In the skiff.

Q. And you came back? [119]

A. I came back to pick up Salmeri, first time I saw the fire.

Q. Where did you see the fire, the first time you saw the fire, where was it?

A. On the dock and on the water.

Q. And on the water? A. On the water.

Mr. Nave: Pardon me, one moment, your Honor.

(Testimony of Horace Adagio.)

The Court: Want your recess now? Want an afternoon recess?

Mr. Nave: Thank you.

The Court: We will take our recess.

(Short recess.)

Q. (By Mr. Nave): I hand you a photograph which I will ask be marked for identification.

The Clerk: Respondents' Exhibit B marked for identification.

(Whereupon the above photograph was marked Respondents' Exhibit B for identification only.)

Q. (By Mr. Nave): I will ask you to look at that photograph now; that photograph represents the pilings of the wharf and the water lying below it; you understand? A. Yes, sir. [120]

Q. Now, the Santa Lucia was up against this—these pilings when this explosion occurred. You understand that? A. I can't see what—

Q. This was taken after the—

A. I understand, but I can't explain it.

Q. All right. Now, the fire that you saw—

The Court: Has this been marked for identification?

Mr. Nave: Yes, your Honor.

The Court: In evidence, is it?

Mr. Nave: For identification.

Q. (By Mr. Nave): Now, the fire you saw was on the water down at the bottom of these pilings—

(Testimony of Horace Adagio.)

The Court: Counsel, it isn't my practice to permit a witness to be interrogated concerning a photograph which has not been received in evidence.

Mr. Nave: Very well. Any objection to this offer in evidence?

Mr. Vartan: No, your Honor.

Mr. Nave: Then it will be offered in evidence.

Mr. Silvers: This is for the limited purpose of showing the structure of the wharf and the pilings and the water immediately around it at the time of the explosion?

Mr. Nave: This is for the purpose, the immediate purpose, Mr. Silvers, of asking this witness to identify where [121] he saw the fire on the water.

The Court: Let me see if I can straighten it out. Is this a fair representation of that projection of the dock on which the pump was located at or about the time of the explosion?

Mr. Nave: Yes, your Honor.

The Court: Not indicating the height of the water.

Mr. Silvers: Not also indicating any of the structures, of course, on the gas docks. This is a post-accident photograph and a lot of evidence was destroyed, your Honor, by the fire. I just wanted to be sure those limitations were called to the attention of your Honor.

The Court: This is a photograph before?

Mr. Silvers: No, sir. It's a photograph after the——

Mr. Nave: After the explosion.

(Testimony of Horace Adagio.)

The Court: After; how long after?

Mr. Nave: It was taken by an independent photographer, I believe, the following day.

The Court: I see char marks on some of the pilings.

Mr. Nave: This is the actual installation, and there are a number of photographs, counsel.

The Court: With that understanding we will receive it in evidence. There is no objection?

Mr. Vartan: No, your Honor. [122]

The Clerk: Respondents' Exhibit B.

The Court: It is a photograph of the dock taken the day after the accident, particularly showing the portion protruding where the pumps were located.

Mr. Vartan: Mr. Clerk, it will be Respondent Union Oil's Exhibit; I think they should be separate.

The Court: Yes; Respondent Union Oil Company's Exhibit.

The Clerk: Respondent Union Oil's Exhibit B introduced and filed into evidence.

(Whereupon, the photograph previously marked Respondent Union Oil Company's Exhibit B for identification was received in evidence.)

Mr. Nave: If I had a thumbtack I believe we could put this up on the board.

Q. (By Mr. Nave): Now, Mr. Adagio, calling your attention to this photograph, Respondent's B,

(Testimony of Horace Adagio.)

Union Oil Company, you say you saw fire, several minutes after the explosion, on the water?

Mr. Vartan: Just a minute. For the record, we object to that question. It assumes something not in evidence. He is saying several minutes. I think the witness did not express it in minutes. He said he saw it when he was helping the second man off the boat, and that's the only time element.

Mr. Nave: Very well. [123]

Refer to the deposition of Mr. Adagio on pages 15, 16 and 17.

Q. (By Mr. Nave): I will ask you, Mr. Adagio, that on the 25th of August if these questions were asked you and to which you gave these answers at the time your deposition was taken in connection with this case:

“Question: Now, did you notice any fire after the explosion; did you see any fire any place?”

To which you answered:

“After the explosion? Yes.”

Then you were asked:

“First let me ask you how long after the explosion did you first see any fire?”

To which you answered:

“Answer: I can't tell you that.

“Question: Was it several minutes?

“Answer: Yes.

“Question: Several minutes, is that right?

“Answer: Yes.”

A. I never said precisely. I said I don't know. Always said I don't know.

(Testimony of Horace Adagio.)

Q. Did you give those answers I just read to you?

A. You said about seven minutes, but I said I don't know. [124]

The Court: Several minutes.

The Witness: Several minutes, but I always said I don't know, I can't tell you.

Q. (By Mr. Nave): You did give those answers I just read to you, didn't you, sir? A. Yes, sir.

Q. All right.

"Question: Where did you first see the fire several minutes after the explosion?"

To which you answered:

"When I take Tarantino off the skiff and I turned to take Joe and then now I see the fire."

A. Yes, sir.

Q. "Question: Where did you see it?"

"Answer: Well, all over."

A. Yes, sir.

Q. "Question: All over?"

"Answer: All over, on the deck, on the water, also the water."

A. I don't mean on the deck; on the dock that time.

Q. It says deck here, but you meant dock?

A. I meant dock.

"Question: On the deck and on the water?"

To which you answered: "Yes." [125]

A. Yes.

Mr. Vartan: There are two more questions.

(Testimony of Horace Adagio.)

Mr. Nave: I am going to continue. I am leaving out the statement of counsel in here.

Mr. Vartan: There are two more questions following where you stopped.

Mr. Nave: I am going to read them.

Mr. Vartan: Okay.

Q. (By Mr. Nave): "Question (By Mr. Nave):"—

I will read the whole thing, Mr. Silvers.

"Mr. Silvers: Deck or dock?

"The Witness: Dock, you know, what you call wharf.

"Question (By Mr. Nave): On the wharf?

"Answer: Yes.

"Question: You saw it on the water and on the wharf?

"Answer: Yes."

A. That is right.

Q. "Question: Where in the water did you see it?

"Answer: Well, just the wharf is like that, then the water in the boat, you know, front of the boat, so all over like that." [126]

A. Yes, sir.

Q. "Question: On the side of the boat in the water?

"Answer: Yes. The boat and the wharf, all over."

You answered those questions in that way, did you?

A. Yes, sir, I mean, I wanted it to mean on the

(Testimony of Horace Adagio.)

front of the boat and I always said on the dock and the front of the boat, just like that, all around (indicating).

Q. "Question: All around the boat?"

"Answer: No, just like that.

"Question: One side?"

"Answer: One side."

A. Yes, sir.

Q. "Question: The side next to the wharf?"

A. Yes, sir.

"Answer: Yes, sir.

"Question: On the water, and that's where you first—that and the dock you saw fire on?"

"Answer: That's right."

That's correct, isn't it? A. That's correct.

"Question: Could you tell me where you saw the fire on the dock at that time, where it was coming from? [127]

"Answer: I don't know."

That was your answer? A. Yes, sir.

Q. That is correct, is it, sir? A. Yes, sir.

Q. "Question: Now, when the big explosion came, you heard it and did you notice then that the boat had blown up?"

To which you answered:

"I don't know."

A. Exactly.

Q. Correct.

"Question: Could you see that the cabin had blown apart at that time?"

(Testimony of Horace Adagio.)

Mr. Silvers: Excuse me, your Honor, the witness is here in court.

The Court: I don't know the purpose of this. The only understanding, the only reason I have permitted this is to show contradictory statements made by a witness on a prior occasion.

Mr. Nave: All right.

Mr. Silvers: I will object to any further reading.

Mr. Nave: I think the objection is well taken.

Q. (By Mr. Nave): Now, referring again then to this photograph, Respondent's [128] Exhibit B, Union Oil Company, where did you see the fire on the water as you have described it?

A. On the wharf and the water.

Q. Yes.

A. On the wharf, on the dock and the wharf, just like that (indicating) all over.

The Court: On the dock and the water, indicating along the face of the dock.

Mr. Vartan: Yes, your Honor.

The Court: Along the piling running from the water to the flooring of the dock.

Mr. Vartan: Yes, your Honor.

Q. (By Mr. Nave): That is correct, the surface of the water to the face, the side of the dock, is that what you mean? A. Yes, sir.

Q. That whole thing was on fire?

A. Yes, sir.

Q. When you saw it several minutes after the explosion?

A. I don't know the minutes; I saw it that way.

(Testimony of Horace Adagio.)

Q. Now, did you notice whether or not the cabin of the fishing boat had been blown off at that time? A. I can't tell you that.

Q. You didn't look to see?

A. I didn't have time to look, just heard a boom and then [129] I am so, and when I get up——

Q. Before you took Mr. Tarantino over to the skiff, he was the first one you helped to the skiff, is that right? A. Yes.

Q. Did you notice whether or not the fishing boat was sinking at that time?

A. I beg your pardon?

Q. Was the fishing boat sinking before you took Mr. Tarantino to the skiff?

A. No, sir, it was after the boat, the bottom of the boat, I don't know what you call it, the back part was like that. (Indicating.)

Q. Part of the boat was up in the air?

A. Like that, it was at the time, it was like that.

Q. Like that (indicating). You mean it was level at that time? A. Yes.

Q. When you took Mr. Tarantino off?

A. Yes, sir.

Q. When you returned, what was the condition of the—— A. Same condition.

Q. Same condition?

A. The same condition.

Q. Still level. It wasn't down in the front or down in the back? [130] A. No, sir.

Q. Still level? A. Still.

(Testimony of Horace Adagio.)

Q. You didn't know whether or not there was any damage to the deck or the superstructure?

A. I didn't know.

Q. You didn't pay any attention?

A. Didn't pay attention, no.

Mr. Nave: I believe those are all the questions I have.

Cross-Examination

Mr. Silvers: We would like to offer these two photographs at this time, your Honor, in evidence, as photographs of portions of the gasoline dock area taken after the explosion, again, I believe, within a period of one day.

The Court: Any objection?

Mr. Vartan: No objection.

The Court: Received in evidence by consent.

The Clerk: That is Respondent Cardinale's Exhibits C and D introduced and filed into evidence.

(Whereupon, the two photographs were marked Respondent Cardinale's Exhibits C and D and received in evidence.)

By Mr. Silvers:

Q. Would you take a look at these two photographs that [131] I am showing you, Mr. Adagio. They are meant to portray the side, as you look at the photograph, the side of the gas dock to which the fishing boat, the Santa Lucia, came alongside when it was tied up.

A. The end of the wharf was this one?

(Testimony of Horace Adagio.)

Q. The fishing boat was tied up in the manner that I am indicating.

The Court: On the side of the piling.

Q. Along the side of the piling.

The Court: Shown on Exhibit No.—

Mr. Silvers: Shown on Exhibit No. C, Cardinale Exhibit No. C in evidence.

Q. (By Mr. Silvers): The fishing boat, the Santa Lucia, was tied up in this manner along the side of the pilings; do you understand that?

A. Yes.

The Court: Is that correct, is that where the ship was tied up? Look at the photograph.

The Witness: Yes, it was here.

The Court: He said "Yes," indicating with his hands the side of the piling on the dock extension.

Q. (By Mr. Silvers): The bow of the Santa Lucia would be toward the right side of the photograph and the stern of the Santa Lucia would [132] be toward the left side of the photograph; right?

A. Yes, sir.

Q. What is this (indicating)?

A. That is a tank.

Q. This is one of the tanks on top of the dock?

A. So if this is a tank, the boat was like that (indicating).

Q. With the bow on the right side of the photograph? A. Yes.

The Court: Indicating with the port side up against the piling of the dock shown on this photograph, Cardinale's Exhibit C.

(Testimony of Horace Adagio.)

Q. (By Mr. Silvers): Referring to Cardinale's Exhibit D in evidence, I want you to understand that this, and check it if you will, against Exhibit C, is meant to show a portion of the same area towards the center of the pilings on the side where the ship was tied up. Do you see this object on the wharf I am pointing to in Cardinale's Exhibit C?

A. Yes, sir.

Q. That is meant to be this object shown on Cardinale D, top and center of the photograph, is that clear?

These pilings are pilings on the same face that is shown on Cardinale's Exhibit——

A. This is the same? [133]

Q. Yes. Is this clear to you? A. Yes.

Q. Keep those before you a moment. I want to ask you this: When you first saw the fire, as I have understood your testimony, you said you saw it both on the dock or wharf and on the water, is that right?

A. When I turned my face, when I turn on my face like that (indicating), the first thing I saw was the fire on the dock to the water, just like that, flash!

The Court: You are indicating from the dock in a down direction, in the direction of the surface of the water.

Mr. Silvers: Yes, that is the point I was trying to get to.

Q. (By Mr. Silvers): As you looked at it, the fire appeared to come down from the dock toward the water and the Santa Lucia, is that correct?

A. Yes, sir.

(Testimony of Horace Adagio.)

Q. And the fire on the water, was that, when you first saw it, also visible under the dock inside the pilings that are shown on Exhibits C and D in evidence?

You understand my question?

A. I understand. Yes, sir. When the fire come, it was just like that under this pile, which you call the pile——

The Court: Underneath the pilings? [134]

The Witness: Yes.

Q. (By Mr. Silvers): In other words, the fire you saw on the water was fire underneath the dock, is that correct? There was fire on the water underneath the dock and in back of these pilings; correct?

A. Correct.

Q. That is correct, isn't it? A. Yes, sir.

Q. And the fire appeared to be moving both from the dock on top and from the water below underneath the dock toward the boat Santa Lucia?

A. Yes, sir.

Q. Now, you have told us that you didn't smell any gas before this explosion. Isn't it also true, Mr. Adagio, in this case, first, that you were working with the brail with the anchovies and their heads that you were knocking out? A. Yes, sir.

Q. You had taken on many tons of anchovies that you had just discharged, right?

A. Yes, sir.

Q. And the strongest odor, the odor all around you, was the odor of anchovies, fish, right? This was the smell that you could smell, the fish smell?

(Testimony of Horace Adagio.)

A. Yes, sir. [135]

Q. Your hands and your——

The Court: All over.

The Witness: All over my face.

Q. (By Mr. Silvers): Fish smell.

A. Fish smell, yes, sir.

Q. You were concentrating before this boom was heard on the work that you were doing with the brail, isn't that correct?

A. No, I was standing up.

Q. You were standing up?

A. Standing up and I have nothing in my hands at that time.

Q. Oh, I see, you were standing up, and as I understood your testimony, you were facing the forward part of the boat?

A. Yes, sir.

Q. Is that correct?

A. Correct.

Q. And you were on the, if I have understood you correctly, on the port side, or what you call the right-hand side of the boat, but you were in back, to the rear, to the stern of the deckhouse, is that correct?

A. Correct.

Mr. Vartan: I think he said port instead of starboard. [136]

Mr. Silvers: I am sorry. I meant the starboard side. Thank you.

Q. (By Mr. Silvers): You were standing to the right or starboard side of the boat, but you were standing also to the rear?

A. Yes, sir.

Q. Of the deckhouse?

A. Correct.

Q. So that from your left arm running toward

(Testimony of Horace Adagio.)

the wharf and the pilings, there was just the open deck; right? A. Yes, sir.

Q. And it was from that direction that you felt this explosive force? A. Yes, sir.

Q. And it turned you around, as you told us, in this manner (indicating), so that you faced the after end of the boat, is that correct, down on your knees?

A. Yes, but that side, you know, my front was back after I get up.

Q. Instead of facing forward you were facing to the rear or the after end of the boat?

A. Correct.

Q. Right. But you were placed in that position by an explosion that came from your left side, isn't that correct?

Mr. Vartan: I am going to object, Your Honor, [137] please——

Mr. Silvers: Withdraw the question.

Q. (By Mr. Silvers): It is a fact, however, that you were turned from the position that you were in facing forward standing in back or at the deckhouse, you were turned in this manner (indicating), isn't that correct? A. Correct; yes, sir.

Q. And you were turned in that manner by the force that came from your left side?

Mr. Vartan: Object to that, Your Honor——

The Court: Let the record show that will be a half turn to the rear.

Mr. Silvers: A half turn to the rear to the man's right.

The Court: Yes.

(Testimony of Horace Adagio.)

Q. (By Mr. Silvers): The very first time you observed fire aboard the Santa Lucia was after the skiff, into which all the men, including yourself, had gone, had pulled away from the Santa Lucia, isn't that correct? It was not until the skiff had pulled away from the Santa Lucia that you saw fire on the Santa Lucia? A. Correct; yes, sir.

Mr. Silvers: I have no further questions.

The Court: You have no redirect, have you? [138]

Mr. Vartan: No, Your Honor.

The Court: That is all for this witness. Thank you, sir.

(Witness excused.)

The Court: Any other witnesses here?

Mr. Vartan: No, Your Honor.

The Court: Do you wish to produce any depositions in evidence?

Mr. Silvers: I have this in mind, in view of Your Honor's remarks before we began, I think that Mr. Nave and myself may have objections to certain portions of the depositions which should be brought to Your Honor's attention at the time they are being offered, and we have no objection to them being offered and Your Honor reading them, but we would like to reserve any objections.

The Court: If you have any specific objections to any of the questions propounded to the witness, you may state them tomorrow, and I will rule upon them.

Mr. Silvers: Thank you.

The Court: May I call to your attention that this is a suit in Admiralty and the rules of evidence in Admiralty are very, very liberally applied and not bound by any common law rules of evidence.

Mr. Vartan: Do we have the original deposition of Francois Cardinale there? [139]

The Clerk: Yes, the Court has that one.

Mr. Vartan: Very well, I won't need it.

The Court: You offer it in evidence?

Mr. Vartan: Yes, Your Honor.

The Clerk: Libelant's Exhibit 3 introduced and filed into evidence.

(Whereupon the deposition of Francois Cardinale was marked Libelant's Exhibit No. 3 and received in evidence.)

The Court: I take it, then, there is no objection to the regularity of the taking of these depositions and counsel reserves to themselves the right to make specific objections tomorrow morning at the opening of court to specific questions embodied in this deposition; otherwise there was no objection.

Mr. Silvers: That is correct, Your Honor.

Mr. Vartan: May I be sure, Your Honor, that the original has the——

The Court: Yes, it has the exhibits attached to it, exhibits attached, and also deemed to be received in evidence as part of this Libelant's Exhibit No. 3.

Mr. Vartan: One observation, Your Honor, so that we don't have the record in error, the exhibit

that is attached is similar to the large diagram on a smaller scale——

The Court: The Court has observed that.

Mr. Vartan: Yes. And the vessel Avila that is on the exhibit attached to the deposition is much farther away [140] from the Santa Lucia. There may be a dispute on that and Your Honor can, of course, rule on that.

The Court: It is farther to the south and more inland.

Mr. Vartan: That's right. There will be a conflict of evidence.

The Court: I have observed that.

Mr. Vartan: So we don't want to waive that observation by offering the deposition.

And for the record I state, as an officer of the Court, that Francois Cardinale, the reason the deposition was taken, Your Honor, one of the Libelants, he was leaving for Algiers and he is now presently in Algiers and that's the basis of offering the deposition.

Mr. Whelan says he is in France. Anyway, he is not here.

Now, we were going to give Your Honor a memorandum which was filed in the exception to the wage and cure actions, or maintenance and cure actions. Those are the ones—there are two copies there, Your Honor, and they happen to be in one of the other cases. At any rate, the same memos are filed in each case and, counsel, I believe you have counter authorities, maybe you want to leave them with the Court, too.

Mr. Nave: There was a written memorandum filed in the four wage cases, as I understand it. [141]

Mr. Whelan: That is right, but the Judge this morning asked for extra copies and I am supplying the extra copies, that was all. You have copies of our memorandum.

The Court: Supposing then I read this deposition overnight. You have no oral testimony to present now, I take it?

Mr. Vartan: No, Your Honor.

The Court: You ask then for an adjournment until tomorrow morning?

Mr. Vartan: Yes, Your Honor.

The Court: We will adjourn, then, until 10:00 o'clock tomorrow morning. If counsel can come in chambers, I would appreciate it. Just for a few minutes.

(Whereupon, this matter was adjourned until the hour of 10:00 o'clock a.m., Wednesday, September 4, 1957.) [142]

September 4, 1957—10:00 A.M.

The Clerk: Salmeri, et al. versus Cardinale, et al., further trial.

Mr. Vartan: Ready.

Mr. Nave: Ready.

Mr. Silvers: Ready.

The Court: All right, you may proceed.

Mr. Vartan: Mr. Garrett Ray.

GARRETT RAY

called as a witness by and on behalf of the Libelants, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court, sir.

The Witness: Garrett Ray.

Direct Examination

By Mr. Vartan:

Q. Garrett Ray, what is your age, please?

A. 29.

Q. Are you a married man? A. Yes, sir.

Q. Family? A. Yes, sir.

Q. How many children?

A. Two boys. [143]

Q. At the present time where do you reside?

A. At Venice, California.

Q. Venice, California. Now, what is your business or occupation at the present time?

A. I am a journeyman carpenter.

Q. Prior to that occupation what was your occupation? A. Merchant mariner.

Q. How long did you go to sea in all?

A. Around 11 years.

Q. On September 28, 1954, by whom were you employed? A. Union Oil.

Q. And were you attached to a vessel?

A. Yes, sir.

Q. What was the name of that vessel?

A. The Lompoc.

(Testimony of Garrett Ray.)

Q. That's L-o-m-p-o-c? A. Yes, sir.

Q. For the record what type of vessel was that?

A. Well, that was a T-2 type tanker.

Q. How long in all were you attached to that vessel?

A. About a year and five days.

Q. What was your capacity with the vessel?

A. I was an A.B. maintenance man.

Q. Now, Mr. Ray, directing your attention to September 28, 1954, did you work that day?

A. Yes, sir.

Q. And about what time did you finish work?

A. Around 4:30, twenty minutes of five.

Q. That would be in the afternoon?

A. Yes, sir.

Q. Will you tell us briefly what you did when you finished work?

A. Well, I grabbed something to eat and then I went down fishing down off the tugboat.

Q. About what time was it that you started fishing from the tugboat?

A. Oh, five o'clock, a little after.

Q. And the tugboat that you were fishing from was the tugboat Avila? A. Yes, sir.

Q. Now, I direct your attention to the diagram, I think it is Libelant's Exhibit 2, and it generally shows an outline of the Union Oil wharf at Avila, it shows an offset, I am pointing here where there was a gas dock, and the portion below the offset is an enlargement of the same area. Then on the diagram is what purports to be the tugboat Avila with

(Testimony of Garrett Ray.)

its size, 31 by 11 marked underneath it. Is that the vessel you were fishing from? A. Yes, sir.

Q. Now, when you were on the tugboat Avila did you notice [145] a fishing vessel by the name of Santa Lucia come into the harbor?

A. Yes, sir.

Q. Did you observe the fishing boat tie up?

A. Yes.

Q. Where did it tie up?

A. Tied up to the middle gas dock right there.

Q. Now, after the Santa Lucia tied up, Mr. Ray, will you describe its position with reference to the Avila insofar as the way they were pointed or headed?

A. Well, the Avila was tied up with its starboard side to the dock and the fishing boat was port side to and they were stern to stern.

Q. After it tied up—before I ask you that, during all the time we are going to talk about here, the Avila was tied up, too, in other words it wasn't a moving vessel? A. No, it was tied up.

Q. When the Santa Lucia tied up, to make it clear, the stern of the Santa Lucia was to the stern of the Avila, is that right? A. Yes, sir.

Q. Approximately how many feet separated the sterns of these vessels?

A. About forty feet.

Q. Now, what portion of the Avila were you fishing from? [146]

A. Well, mainly from the stern of the Avila.

(Testimony of Garrett Ray.)

Q. How were you dressed that afternoon when you were fishing?

A. Well, rather a warm day, all I had on, well, work pants, khakis or Levis, I don't remember, but a T-shirt.

Q. A T-shirt; you say it was a warm day?

A. Yes, sir.

Q. Was there any wind?

A. No; there wasn't.

Q. Did you observe the Santa Lucia after it tied up? A. Yes, sir.

Q. Did you notice any activity on that vessel?

A. Yes.

Q. Would you tell his Honor what you observed?

A. Well, the first thing I observed they were handing down hoses, they had handed down a fuel hose and water hose and they had taken them to various spots on the boat, and then I watched them clean down their brail nets they had set, had them hanging up on booms and these sailors had scoop nets that they hold up, maybe two feet in diameter, they were knocking the anchovies and things out of the net with.

Q. About how many men in all did you observe on the Santa Lucia at that time?

A. Well, I'd say around 8 or 9.

Q. You didn't count them? [147]

A. No, sir.

Q. Now, you mentioned that you saw hoses handed down. Do you recall the color of those hoses?

(Testimony of Garrett Ray.)

A. Well, from what I recall there was a black one and a red one.

Q. Now, calling your attention to the red hose, did you see anyone from the Santa Lucia take the end of that red hose when it was handed down?

A. Well, I don't remember actually seeing any one person take it. I mean, I couldn't say who it was, but——

Q. I see. Then, I take it, Mr. Ray, you didn't see anyone—you didn't see what was done with the fuel hose?

A. Well, there was two hoses and they were both taken to the port side.

Q. I see. After they were taken to the port side did you notice what was done with the hoses?

A. No; I couldn't see them from where I was.

Q. Mr. Ray, while you were fishing from the stern end of the Avila did you hear any conversation between anyone on the Santa Lucia and anyone—or between that person and someone on the gas dock of the Union Oil Company wharf?

A. Yes, sir.

Q. Will you please state to his Honor what you heard?

A. Well, I heard the fellow from the fishing boat—I can't say who it was—ask up to the dock if he had given him [148] his thirty gallons yet, and the fellow on the dock, I remember, called back, said he had given him fifty or sixty already.

Q. Did you see the gas attendant during that conversation?

A. Yes, sir.

(Testimony of Garrett Ray.)

Q. And where was he?

A. He was on the gas dock—well, just to the—by the big round tanks up there. He was sort of more or less right up toward the rail there.

Q. That would be the edge of the gas dock closest to the Santa Lucia, is that right?

A. Yes, sir.

Q. When you heard that conversation, “Have I got my thirty gallons yet,” and the gas attendant said, “I have given you fifty or sixty gallons already”——

The Court: Did you hear him say, “I have given you fifty,” or did you hear him say, “I have given you sixty”?

The Witness: He had said both of them, sir, said “I have given you fifty or sixty already.”

The Court: That is what you heard him say?

The Witness: Yes, sir.

Q. (By Mr. Vartan): Now, when you heard that conversation did you observe what the gas attendant did?

A. Well, he then immediately took off and started running [149] toward, well, between the long Diesel oil one and that G.M. Diesel there.

Q. And when he was running will you tell his Honor just how many feet you saw him run while he was within your view or vision?

A. Well, I could only see him for about, oh, seven or eight feet, because the dock cut the view off for me.

Q. I see. So you don't know where he ultimately

(Testimony of Garrett Ray.)

ran to? A. No, sir; I don't.

Q. Now, the direction that he ran was, when you mentioned the tanks, that would be from the edge of the dock towards away from the Santa Lucia, is that right? A. Yes, sir.

Q. Did he appear excited? A. Yes, sir.

The Court: What about his actions gave you the impression that he was excited? What did you observe?

The Witness: Well, it seemed like when the fellow, when he told him he had given him fifty or sixty already he immediately after he had said that, he turned around and just taken off right fast, it seemed——

Mr. Nave: That is not responsive to the question.

The Court: We will leave it stand; it is informative. Did you observe anything else except that he ran off fast after he made that statement? [150]

The Witness: No, sir.

The Court: Is that the only observation upon which you base your statement that he appeared to be excited?

The Witness: Yes, sir; that's all.

Q. (By Mr. Vartan): Now, what did you see after you saw the man running, what happened then?

A. Well, then there was this terrific flash and then the explosion and that was——

Q. How long after the flash did the explosion take place?

(Testimony of Garrett Ray.)

A. Well, just about immediately right following it.

Q. Was there any question in your mind but what the flash was first? A. No, sir.

Q. And the explosion was second, is that right?

A. Yes, sir.

Q. Mr. Ray, when you saw this man take off, as you say, and start running, was that prior to your seeing the flash?

A. That was before the flash, yes, sir.

Q. That was before the flash. Can you give us any idea of what area the flash that you observed covered, I mean, how many feet, if you can?

A. Well, I'd say it was at least 15 feet high and covered, oh, a pretty good area.

Q. Now, having in mind the relation of the boat and the [151] gas dock, where was the location of the flash that you observed?

A. Well, it came from the port side of the fishing boat, the side nearest the dock and from the dock and in that vicinity there. I can't—

Q. Could you say what portion of the flash that you saw was in the area of the dock itself?

A. No, sir; I couldn't; just from the dock and port side of the boat.

Q. In other words, the flash was only on the port side of the boat? A. Yes, sir.

Q. What portion of the dock did the flash cover? I realize this is probably difficult. If you don't know, say so. A. I don't know.

Q. All right. What color was this flash, Mr. Ray?

(Testimony of Garrett Ray.)

A. Well, it was orange in color.

Q. Can you tell us how many or how much time elapsed from this conversation that you heard between the gas attendant and somebody on the boat on the Santa Lucia, how much time elapsed from that conversation to the time you saw the flash?

A. Well, just a matter of seconds, a couple of seconds.

Q. What did you do?

Mr. Nave: Pardon me. I didn't understand that. May I have that last answer read?

(Record read by the Reporter.) [152]

Q. (By Mr. Vartan): What did you do then when the flash and the explosion took place?

A. Well, I had been on the stern of the Avila and I more or less got a little push from it and also took over myself and went off the port side of the tug-boat into the water.

Q. What did you do then after you were in the water?

A. Well, I no sooner hit the water when I came right out again.

The Court: Were you thrown off the tug by the explosion, or did you jump?

The Witness: Well, I more or less jumped. I could feel a concussion, too, but I jumped off the port side.

Q. (By Mr. Vartan): And then after, you say immediately after you hit the water you came out?

A. Yes, sir; I didn't stay in at all, hardly.

(Testimony of Garrett Ray.)

Q. Then when you came out which end of the Avila did you come to?

A. Well, I came out the port side just about where I went over, toward the bow.

Q. I see. Then where did you go?

A. Then I headed for the ladder. I came around the after end of the house and started to head for the ladder and these other two fellows were ahead of me. [153]

Q. Did you observe when you came out of the water onto the stern of the Avila and headed for the ladder, did you, at that time, observe the Santa Lucia? A. Yes, sir.

Q. And what activity did you see there at that time?

A. Well, then I saw the fishermen were heading for the stern of the fishing boat. They had a dory tied up there and they were headed for that to get away.

Q. At that time when you saw these fishermen headed for the dory, did you observe any fire or flames on the fishing vessel Santa Lucia?

A. No, sir.

Q. Did you observe any flame or fire in the area of the dock? A. Yes, sir.

Q. At that time. And where was the fire, please?

A. Well, it was located on the face of this gas dock up here around the tanks, right up here, these tanks on the left, and also on the base of the pilings, or on the pilings nearest to the dock.

Q. You say at the base of the tanks; you are re-

(Testimony of Garrett Ray.)

ferring to these tanks that are designated in the diagram, Libelant's Exhibit No. 2 as G.M. Diesel and 76 gasoline? A. Yes, sir.

Q. Is that the area that you saw the flames? [154]

A. Yes, and up toward the rail up there in the front, up in through there (indicating).

Q. The edge where I am pointing?

A. Yes.

Q. That would be the edge of the dock closest to the Santa Lucia? A. Yes, sir.

Q. Did you observe any flames coming at the top of the tanks, Mr. Ray?

A. No, sir; I don't remember any coming up toward the top.

Q. Now, you said something about seeing flames on the pilings. Will you please explain that more carefully?

A. Well, it looked like it had more or less—it was burning on the dock itself and then was coming through the dock and down through the pilings.

Q. Underneath the dock? A. Yes, sir.

Q. All right. Can you give us your best estimate of the time that elapsed from the flash and explosion to the time you observed the fire on the dock area that you have just described?

A. Well, that was about, I'd say, around thirty seconds.

Q. Then I think you were at the ladder going up and you went up to the wharf itself, is that right?

A. Yes, sir. [155]

Q. Did you subsequently reach the level, the

(Testimony of Garrett Ray.)

floor level of the wharf? A. Yes, sir.

Q. At that time did you observe the gas attendant?

A. Yes, sir; he was running down the dock.

Q. I see. And did you have any conversation with him? A. Yes.

Q. Will you please state what that conversation was?

A. Well, he ran down and the three of us were up there; I was the last one to get up, and we had asked him if there was anything we can do, anything to help these fellows that were on the boat, and he stated that everything was going to blow up; that it was burning, and that he thought that the fishermen were all dead, and to get out of there.

Q. Now, you mentioned "when the three of us," I neglected to ask you, when you were fishing on the Avila were there any of your shipmates also fishing? A. Yes, sir.

Q. What portion of the Avila were they fishing from?

A. Well, they were fishing about, just aft of the house, and they were facing the dock on the star-board side.

Q. About how many feet away from you were they? A. Oh, around, I'd say, ten feet.

Q. I see. Now, you say you had been to sea for eleven years, Mr. Ray. During at least a portion of that time you [156] were attached to tankers, is that right? A. Yes, sir.

Q. And other vessels of that nature. Were you

(Testimony of Garrett Ray.)

familiar with grounding cables? A. Yes, sir.

Q. When you saw these hoses passed down to the Santa Lucia, did you observe any grounding cable passed down by the gas attendant?

Mr. Nave: Just a moment, if your Honor please. I object to that line of inquiry, no showing that this man is an expert in that matter, or had any occasion to——

The Court: Well, he can tell us what he observed. He worked on tankers for ten years, but I think the question is objectionable as leading and suggestive.

What else did you see, if anything, happen at or about the time of the passing down of this red hose and the black hose?

The Witness: Well, that is all I observed they passed down, just those.

The Court: See anything else passed down?

The Witness: No, sir.

The Court: If you wish to qualify him as an expert in the handling of gasoline, you may do so, show his experience.

Q. (By Mr. Vartan): Now, during the time that you were attached to these [157] vessels that you have testified to, did you personally ever handle the grounding cables?

A. Yes, sir; I have hooked them up before.

The Court: What is a grounding cable?

The Witness: Well, you want me to——

Q. (By Mr. Vartan): Yes; explain to his Honor what you mean by grounding cable.

A. Well, it's a cable with more or less a—well,

(Testimony of Garrett Ray.)

like a clamp, has got a screw clamp on it that hooks onto the side of the ship, and from what I have ever got from it is that it is supposed to more or less ground out the ship, I guess, take it, oh, well, just like you ground it out, more or less, I guess, would take the, any knocks or anything away from it, I guess.

The Court: You don't know much about it, do you?

The Witness: Not too much.

The Court: These tankers that you worked on, were they steel tankers?

The Witness: Yes, sir.

The Court: Was this fishing sloop a steel sloop, steel hull?

The Witness: I would say it was wood.

The Court: You didn't even observe whether it was wood or steel, did you? [158]

The Witness: Well, I know it was wood, yes.

The Court: You know it was wood. Have you ever seen these grounding cables used from wood ships?

The Witness: No, sir.

The Court: I see. All right.

Q. (By Mr. Vartan): Mr. Ray—for the record, your Honor, I didn't intend to qualify the man as an expert; he has stated what his duties were on these vessels; I merely wanted to show that he did not see——

The Court: All right.

Mr. Vartan: All right.

(Testimony of Garrett Ray.)

Q. (By Mr. Vartan): Mr. Ray, you say after the man on the vessel said, "Have I got thirty gallons yet," and the gas attendant said, "I have given you fifty or sixty already," you observed the man run towards the rear of the gas dock. Now, at that time, or any subsequent time, did you see the man on the dock with a red fire extinguisher in his hand?

A. No, sir; I didn't.

Mr. Vartan: You may cross-examine.

Cross-Examination

By Mr. Nave:

Q. Mr. Ray, you were a crewman or seaman aboard the [159] Lompoc, is that correct?

A. Yes, sir.

Q. And so that the Court may understand this situation, to clarify it, on the drawing on the blackboard, which is Libelant's Exhibit 2 in Evidence, is shown an outline of the Lompoc?

A. Yes, sir.

Q. The Lompoc is a tanker?

A. Yes, sir.

Q. And you were a crewman on that?

A. Yes, sir.

Q. On that ship. Now, the tug Avila that you have pointed out on the Libelant's Exhibit 2, was it tied up to the wharf?

A. Yes, sir.

Q. And to get from the wharf to the Avila you go down a ladder?

A. Yes, sir.

Q. And the ladder, in other words, was right over the tug Avila?

A. Just about in the center.

(Testimony of Garrett Ray.)

Q. In the center. And now are you of the opinion, do you believe that the Avila was, the stern was about forty feet from the stern of the Santa Lucia?

A. Yes, sir.

Q. Do you know that the ladder you are speaking of is in [160] this area of this offset as shown here on the dock?

A. Yes.

Q. In this position?

Mr. Silvers: Just a minute. I didn't hear the question. Mr. Nave, could you lift your voice a bit?

Mr. Nave: All right.

Q. (By Mr. Nave): Isn't it a fact that the Avila instead of being in the position shown on this sketch, Libelant's Exhibit 2, was actually in this position that I have indicated here with the end of my pencil?

A. That is about where the ladder is, right there where you are pointing.

Q. The ladder, in other words, is in this area. I will ask you to step up to this board, if you will, please, and if you will mark an X or a circle—a circle will be fine—where the ladder was located, and just draw a line out from that.

The Court: Let him write "ladder" alongside of it.

Do you know how to spell ladder? That's it. What have you done, now? Tell us what you have done. Tell us what you have done.

The Witness: I put a circle where I say the ladder was. [161]

(Testimony of Garrett Ray.)

Q. (By Mr. Nave): Now, will you please put your initials "R. G."——

Mr. Silvers: "G. R."

Mr. Nave: "G. R." Thank you, Mr. Silvers.

Q. (By Mr. Nave): So that the position shown on this sketch of the Avila is not correct, is it?

A. Not according to this layout, no, sir.

Q. So the Avila is centered, the center of the Avila was in the position that you gave for the ladder, where the ladder is?

A. The stern was about right there (indicating).

Q. Thank you. Now, the weather on the day of this explosion you have testified was warm?

A. Yes, sir.

Q. And you don't recall the prevailing wind or how much wind there was, do you?

A. Well, there wasn't much at all, if any. It was a real calm day that day.

Q. But you don't recall whether it was three miles or five or less?

A. Well, it couldn't have been more than five.

Q. Couldn't have been more than five. And do you know that the wind was blowing from three to five miles an hour in the direction across the dock?

A. Well, that is something—that has been a long time to [162] remember something like that this long.

Q. You don't recall, in other words?

A. Well, might have at the time, but not now.

Q. All right. How long had you been on the stern of the tugboat Avila fishing, approximately,

(Testimony of Garrett Ray.)

before the Santa Lucia, the fishing boat, came in to the wharf?

A. I imagine around 45 minutes.

Q. About 45 minutes. How many men were there on the tub Avila fishing with you?

A. There was two fellows and myself.

Q. Two other men? A. Yes, sir.

Q. First, who were the other two men?

A. The other was a fellow named Scott; I don't remember his first name; his last name is Scott, and then there was another kid named Mark Jensen.

Q. Where was Mr. Scott on the Avila?

A. Well, Scott and Jensen, as I remember, were both—both of them were on the starboard side of the Avila toward the dockside.

Q. You, yourself, were on the stern?

A. Yes, sir.

Q. Now, when the fishing boat Santa Lucia came into the dock there, did you observe the mooring of the Santa Lucia? A. Yes, sir. [163]

Q. You saw that it was secured by ropes to the dock? A. Yes, sir.

Q. And then at that time you heard this conversation that you mentioned, or was it later? You heard no conversation at that time?

A. No, sir; not at that time.

Q. You didn't hear any conversation between anyone on the Santa Lucia and the man who was on the dock, the oil dock?

A. Not when they tied up, I don't recall any, sir.

(Testimony of Garrett Ray.)

Q. The only conversation you heard was later when you stated Mr. Cardinale asked him if, "I have got my thirty gallons?" A. Yes, sir.

Q. That was some time later?

A. Yes, sir.

Q. All right. Do you know approximately how long it was after the Santa Lucia had tied up that you heard this conversation, Mr. Cardinale or someone, asking about thirty gallons?

A. Well, I would estimate it about eight minutes or more.

Q. Now, from time to time you were watching the fishing boat, were you? A. Yes, sir.

Q. Seeing what was going on over there?

A. I was more or less watching.

Q. And you saw a red hose and a black hose being lowered [164] from the Union Oil dock down to the fishing boat? A. Yes, sir.

Q. And you saw someone take the hoses, did you?

A. Yes, sir.

Q. Did you see what was done with the hoses?

A. Well, no; only except that they went up port side with them. I don't know what they did with them.

Q. Did you observe or notice what was on the end of the hoses in the way of nozzles?

A. No, sir; I didn't.

Q. Did you at any time see anyone on the fishing boat inserting the hose nozzle into any of the tank openings on the deck, on the deck of the fishing boat?

(Testimony of Garrett Ray.)

A. Well, no, sir, I didn't; not on the port side, but it is like I say, it is quite a while ago, to remember some of these things. I thought I remembered something on the—more or less on the starboard side. I thought maybe they had a hose there, but I can't say for sure. It is a long time ago.

Q. You just don't recall? A. No, sir.

Q. Now, did you make an observation before this explosion relative to someone handing a cup of coffee out of the galley of the fishing boat for someone?

A. Yes, sir; someone handed a cup. I can't say what it was, but it was a cup, type of coffee [165] cup.

Q. How long was that before you felt this explosion and you saw a flash?

A. I don't remember.

Q. You couldn't say?

The Court: Can you give us any idea? Was it an hour, half hour, ten minutes, five minutes?

The Witness: It wasn't that long.

The Court: How long would you say it was, as best you recall?

The Witness: Well, I would say maybe four minutes or so after that, four or five minutes. It was while they were scraping the nets down, I know that.

Q. (By Mr. Nave): Mr. Ray, can you tell me——

The Court: Excuse me just a moment. Was it after the hose had been passed down to the ship?

(Testimony of Garrett Ray.)

The Witness: Yes, sir.

The Court: How long would you say after the hose was passed down did you see this coffee, cup of coffee?

The Witness: About four or five minutes, I would say.

Q. (By Mr. Nave): How long was it from the time that you saw the red gasoline hose passed down until you felt the explosion, how much time had passed? [166]

A. Around eight minutes.

Q. Around eight minutes? A. Yes, sir.

Q. Could you hear any conversation going on in the fishing boat at any time before this explosion?

A. Well, I could hear them talking, but I didn't take any interest in what they were saying.

Q. Did you smell any gasoline before this explosion? A. No, sir.

Q. Any unusual odors of any kind in that area before you felt the explosion? A. No, sir.

Q. Now, Mr. Ray, you testified in the other case involving this same accident and explosion some time last year, didn't you, sir?

A. Yes, sir. I don't remember just what it was.

Q. I will ask you at that trial if this question wasn't asked you——

Mr. Vartan: Just a moment, counsel. Don't you think we are entitled to see what you are——

Mr. Nave: Certainly. I assumed you had a copy of the transcript.

Mr. Vartan: No; we do not.

(Testimony of Garrett Ray.)

Mr. Nave: I certainly beg your pardon.

Mr. Vartan: Do you have a copy? [167]

Mr. Silvers: No; I don't.

Mr. Nave: This is in reference to the coffee and the cook in the galley.

Mr. Silvers: Where are you beginning, counsel?

Mr. Nave: Where I have indicated.

Q. (By Mr. Nave): Mr. Ray, I asked you at that time this question and you gave this answer:

“Question: Now, you stated that you noticed someone from the galley that you believe was a cook hand out a cup of coffee to someone?

“Answer: Yes, sir.”

Is that right? A. Yes, sir; it was.

Q. “Question: Will you just state as near as you can recall what you saw in respect to this cup of coffee?”

To which you answered:

“Answer: Well, he merely just stood by the door by the galley and handed the fellow the coffee.”

You gave that answer to that question, didn't you, sir? A. (Witness nodding.)

“Q. Did you see the person, that is, the entire person, or [168] did you see a hand or an arm or something appear handing the coffee?”

“Answer: The entire person.”

That is correct, isn't it?

A. Yes, sir. Like I say, it is quite a while back, the exact words.

Q. Now, the time element, Mr. Ray, between the arrival of the fishing boat to the explosion was from,

(Testimony of Garrett Ray.)

your opinion, from eight to ten minutes, is that right? A. Yes, sir.

Q. Now, Mr. Ray, you were in a kneeling position, if I understood you correctly, on the stern of the tug Avila when this explosion took place, is that right? A. Yes, sir.

Q. And in that kneeling position were you generally facing towards the stern of the fishing boat Santa Lucia?

A. Just about directly toward it, yes, sir.

Q. You noticed and felt a very severe explosion, didn't you?

A. I didn't say I felt a severe one, no, sir.

Q. Well, you felt an explosion?

A. Yes, I felt it, yes.

Q. You wouldn't say it was severe?

A. Well, I probably don't know the exact meaning of severe.

Q. I see. [169] A. I'm not——

Q. The term violent, was it a violent explosion, would you say that?

A. Well, it was enough that I could feel it, I would say that.

Q. You could feel it. All right. Did you notice that at the time of the flash and explosion that they were just together?

A. Well, I would say that the flash was first and the explosion came, oh, just a matter of a second right after.

Q. They were within a second or less, they almost happened together, didn't they?

(Testimony of Garrett Ray.)

A. Well, just one after the other, yes.

Q. Did you notice at that time, or very shortly after that, that the fishing boat blew up?

A. You mean blew up, the whole thing, or what?

Q. Well, part of it, did you see part of the boat go up in the air, part of the cabin go up and the mast disappear?

A. Well, just almost immediately the mast fell down and the boat went just like that (indicating).

Q. You saw the bridge house collapse with the mast?

A. Yes, sir; the mast was just about—well, stood just about, oh, I'd say, almost on it and the mast came down and the bridge house just collapsed almost immediately. Just happened like that. [170]

Q. At that time, I am speaking now when you saw this flash and heard the explosion and felt an explosion, you saw the mast fall and the bridge of the fishing boat, collapse, didn't you?

A. Yes, sir.

Q. All right. At that time and up to that time you hadn't seen any fire anywhere in that area, had you?

A. No, sir; I hadn't.

Q. No fire discernible to you anyplace?

A. No, sir.

Q. Even when the mast collapsed and the superstructure collapsed on the fishing boat?

A. No, sir; I hadn't saw any.

Q. Saw no fire. Now, you stated, Mr. Ray, if I understood you correctly here, you described the color of this flash as being orange?

(Testimony of Garrett Ray.)

A. Yes, sir; had an orange color to it; yes, sir.

Mr. Nave: I will ask you at page 66——

Mr. Vartan: We don't have a copy, counsel. It is customary, when copies are made of these things that counsel be offered a copy. Now, you got a copy and we haven't got one.

Mr. Nave: This was made at the other trial.

The Court: Now, gentlemen, I like to hear you so friendly in relations, but let's get on with the trial of the case. If you want to look at any of these papers when you [171] cross-examine the witness, you may do so.

Mr. Vartan: Yes, your Honor. What page?

Q. (By Mr. Nave): I asked you this question at the other trial, Mr. Ray, in reference to the flash:

“Question: Now, the flash that you have described, can you describe that in reference to the nature of the flash; did it have a color, was it similar to a bolt of lightning, or an explosion of a bomb or firecracker, how can you describe that, sir?”

To which you answered:

“Yes, sir. I would say it was more on the explosion of a, well, it had a color to it being more or less a light being orange and white through it just like a regular, oh, light flash. Anyway, it didn't last long; it merely just flashed like that.”

That's the correct description of what you saw, Mr. Ray, is that right?

A. (Witness nodding.)

The Court: Is that correct?

(Testimony of Garrett Ray.)

The Witness: Yes, sir. I could have said it. I forgot the white part of it. [172]

Mr. Nave: I didn't mean to interrupt. Is your Honor through asking questions?

The Court: Yes.

Q. (By Mr. Nave): Were you able to pinpoint where you saw that flash? A. Yes, sir.

Q. Where did you see it?

A. Well, I saw it on the port side of the fishing boat and on the side of the dock in that area. I mean exactly where, it is hard to say.

Q. You couldn't say just exactly where it was other than what you have just stated, that it was from the fishing boat, port side, and the dock port side area, is that right? A. Yes, sir.

Q. Now, you saw a man up on the service station dock, I believe you stated he turned and ran?

A. Yes, sir.

Q. How long was that before you saw this flash and heard and felt this explosion?

A. Well, they all happened just about the same time.

Q. A matter of a second?

A. Matter of seconds, yes.

Q. In other words, the man ran about the same time that the flash and explosion?

A. Yes, sir; he got about, I'd say, oh, maybe six feet [173] away, and then this——

Mr. Vartan: Finish "this"——

The Witness: Well, this flash.

Q. (By Mr. Nave): Now, when you came back

(Testimony of Garrett Ray.)

up on the tug from the water, then you went up the ladder, as I understand it, to the dock?

A. Yes, sir.

Q. When was it, or should I say this, first: Where were you when you first noticed any flames in the area?

A. Well, just when I was coming up the side of the tug boat Avila I had to wait to get up the ladder, the other two fellows were before me, and I noticed when—well, when I was at the base of the ladder, oh, more or less waiting to get up the ladder.

Q. If I may ask you this, sir: You were on the stern of the boat Avila and you jumped overboard——

A. The other way.

Q. You jumped over in this direction (indicating on diagram)?

A. Toward the bow.

Q. How long did you remain in the water?

A. Well, just about as soon as I hit I came back up again.

Q. You came back up and climbed back up on the tub Avila?

A. Yes, sir.

Q. Then you went over to the ladder and you were waiting [174] there at the ladder?

A. Yes, but I came up from the bow—you were pointing to the stern—I came up from the bow, around the house and then toward the ladder. In other words, when I came up I was facing the oil dock as I came up, the gasoline dock.

Q. Could you give me your best expression of time from the time that you jumped off the Avila

(Testimony of Garrett Ray.)

until you came over to this ladder and made this observation about fire, how much time had elapsed in that period of time?

A. Oh, I'd say possibly around—well, as close as I can come to it, I'd say maybe ten seconds.

Q. About ten seconds.

A. From what I can remember at this time.

Q. In other words, in ten seconds you went off in the water, climbed back on the tug Avila and went over to that ladder?

A. Yes; I had to wait at the ladder, though.

Q. Wait at the ladder. Then what did you see? You made an observation and saw some fire; what did you see then?

A. Well, I saw the fire, like I say, coming from the base of the gas dock, and then from the rail of it over toward the rail side and down, it is kind of coming down the pilings, not to the water, but the pilings that were supporting the dock.

Q. Now, I call your attention to a photograph, Mr. Ray, that is on the board here, that is marked Respondent's [175] Exhibit B, and if I were to tell you this is a photograph——

A. Yes.

Q. ——of the pilings and the dock of the Union Oil installation, you may assume that is correct?

A. Yes.

Q. Now, you saw fire on these pilings that go from the waterline up to the dock, did you?

A. Yes, sir, but they weren't all the way to the water, no.

Q. Well, where did you see the fire?

(Testimony of Garrett Ray.)

A. Want me to show you?

Q. Yes, sir.

A. Well, it is right in through here (indicating) and it was down on the pilings, it didn't come all the way, and then right underneath the dock, a lot of it, and then on the pilings, but it didn't run all the way to the water.

Q. In other words, it hadn't gotten to the water-line at that time?

A. No, sir; about in through here, came up the pilings out underneath the dock and up through here (indicating).

Q. So that we can identify this, if I am wrong you correct me, your testimony is that you saw fire on the face of these pilings about halfway down from the bottom of the dock to about halfway down the pilings going down toward the water, is that right? [176]

A. Yes; I would say so.

Q. And you saw fire underneath, the flames on the face of the dock that faces the fishing boat?

A. Yes, sir.

Q. That is correct? A. Yes.

Q. That is where you saw this fire?

A. Yes.

Q. Then after you got up—

Mr. Vartan: Just a moment. I hesitate to interrupt, your Honor, but the identification of the site of the fire by Mr. Nave did not cover that the fire was seen in the area of the gas tanks further back.

The Court: You make a note of that and ask him on redirect.

(Testimony of Garrett Ray.)

Mr. Vartan: Very well, your Honor.

Q. (By Mr. Nave): Then you came back up on the dock, you saw the young man whose name is Caldwell, actually, the service station attendant?

A. Yes.

Q. Did you observe at that time whether or not he showed any evidence of being injured?

A. Yes, sir; I could remember seeing what—I remember anyway that he had looked like he was cut on his temple and [177] I remember one other cut, but I don't remember where it was right now.

Q. And his face showed evidence of being burned, didn't it?

A. He showed evidence of being burned.

Q. You saw the face of Mr. Caldwell showed evidence of being burned, didn't it?

A. I don't remember.

Mr. Nave: Page 77 of the transcript of his testimony.

Q. (By Mr. Nave): At the other trial, Mr. Ray, you were asked this question by me:

“Question: Did Mr. Caldwell show any evidence of being burned?”

To which you answered:

“Yes, sir; on the face a little; that is the only part I noticed. I was in quite a bit of shock, and he was, too.”

That is correct, isn't it? Does that refresh your memory? A. Yes, sir.

Q. Mr. Caldwell was in a state of shock at the time you saw him? A. Yes, sir.

(Testimony of Garrett Ray.)

Q. And he showed evidence of being burned in his face? [178] A. Yes, sir.

Q. Now, you had conversation at that time with Mr. Caldwell; just what did you say to him and what did he say to you?

A. Well, as close as I can come to it I asked him if there was anything we could do, in other words, anything to do to help the sailors down there and he told us that the place was, that it was burning and he thought it was going to blow up any minute and that he thought the sailors were all dead and to get out of there.

Q. He told you he thought that everyone is dead, speaking of the fishermen? A. Yes, sir.

Q. And everything was on fire and that it was going to blow up and to get out of there, is that what he told you? A. Yes, sir.

Q. Did you notice at the time that you talked to Mr. Caldwell that in addition to the cuts you mentioned on his face, temple, and the burn on his face, that he had cinders on his face?

A. Oh, I don't remember it at this time.

Q. I will ask you in response to this at the other trial if you weren't asked this question:

“Question: Just state what you said to him and what he said to you at that time.

“Answer: Well, I think I was the first [179] one to talk. I asked him if any of the fishermen were in the water or anyplace, if we could help him pull them out and if by any chance we could do him any good. And he said that, in these words, more or less,

(Testimony of Garrett Ray.)

'No, they are all dead and everything is on fire and is going to blow up.' He said, 'Get out of here.' So right after that he took off. He went, oh, towards the office on the dock. He had been, oh, cut to the head here and little cinders more or less to the face. His clothes I didn't notice.'

Isn't that correct, sir? Does that refresh your recollection? A. Yes, sir; it does.

Q. So you did see some cinders in the man's face at that time?

This little office you are speaking of that Mr. Caldwell was headed for at that time is indicated on the south end of this sketch, which is Libelant's Exhibit 2 marked "Office"?

A. Yes, sir; that's it.

Q. The change room and office, you are familiar with that, generally? A. Yes, sir. [180]

Q. At the far end of it. What did you do, then, Mr. Ray, after you had this conversation with Mr. Caldwell? Did you stay in the area or did you go back to the Lompoc, or what did you do?

A. Well, I remember the bo'sun coming up about that time, he was running down, so if I remember right this fellow, I think it was Jensen, and I think the bo'sun and myself started to hook up a fire hose just about, right by the little offset, not the gas, but the other one, and we started to hook that up, and then they started to holler from the ship to get back; they told us, more or less, everybody to get back.

(Testimony of Garrett Ray.)

Q. In other words, you got a signal from the Lompoc to come back on the Lompoc, is that right?

A. Yes, sir; they wanted to get the ship out of there.

Q. When you were starting to assist in hooking up the fire hose, did you make any further observation toward the dock installation or the fishing boat Santa Lucia as to the fire situation then?

A. Yes, sir; I glanced at it and also noticed the fishermen in the dory at the time. I never stated that before, but I remember now of coming back, that I had seen them out there in the dory.

Q. In the dory? A. Yes, sir.

Q. By that time you saw quite a terrific fire going? [181]

A. Yes, sir; it was going pretty good.

Q. And over a considerable area?

A. Yes, sir.

Q. Did you notice that the fishing boat itself was showing flames at that time?

A. Well, I hadn't seen any on it, no, sir; I didn't notice any on it from what I could see of it. A lot of it on this little offset here on the gas dock was going pretty good.

Q. The fire at that time was concentrated in the area you previously mentioned on the face of the pilings on the dock and on the service station area, too?

A. Well, at that time I couldn't see the pilings too good, but mainly on the service station area.

(Testimony of Garrett Ray.)

Q. How high were the flames, according to your observation at that time?

A. I probably at that time I could have easily said, but, like I say, now I don't recall too good.

Q. It was a big fire?

A. Yes, sir; it was pretty good.

Q. Could you see the fishing boat?

A. Well, from where I was I could see a stern of a boat, the stern of the fishing boat, because it was kind of propped up a little bit from going down.

Q. In other words, the stern was up and the bow was down, is that right? [182]

A. No; the stern and the bow were both—like I say, when it sunk, it went like that.

Q. Fractured—— A. Yes, sir.

Q. Broken in the center?

A. From what I recall, yes, sir.

Q. And it was sinking, it was in the process of going down, isn't that right? A. Yes.

Q. Then you went back to the Lompoc. Did you make any further observations as to the condition of fire or the condition of the fishing boat after you left in response to the call from the Lompoc?

A. No, sir; I didn't; all I could see was the fire.

Q. You could see a big fire?

A. I was sent back to the ship.

Q. And the Lompoc took off?

A. Well, yes; this other fellow and I let go of the lines.

(Testimony of Garrett Ray.)

The Court: Do I understand as you observed the ship going under it broke asunder amidships?

The Witness: To me it did, yes, sir.

The Court: And midships then it went down——

The Witness: Well, it didn't completely go down, it just broke. Actually it didn't look to me like it was going to sink, it more or less broke and just about stayed [183] there.

The Court: And settled down there?

The Witness: Yes, sir. The stern protruded slightly, from what I recall, the bow a little bit, yes, sir.

Mr. Nave: I have no further questions. Thank you, Mr. Ray.

Mr. Silvers: Should we take our morning recess at this point?

The Court: All right. How long do you generally take?

Mr. Nave: Ten minutes.

The Court: All right.

(Short recess.)

Mr. Silvers: Your Honor, I have three photographs which I have shown to counsel which I would like to offer in evidence as Respondent's Cardinale Exhibits next in order.

The Court: Received in evidence by consent.

The Clerk: Respondent Cardinale Exhibits E, F and G.

(Whereupon, the foregoing photographs were received and marked as Respondent Cardinale Exhibits E, F and G in Evidence.)

(Testimony of Garrett Ray.)

The Court: What is it stipulated that these are photographs of?

Mr. Silvers: Exhibits E and F are aerial [184] views showing the Union Oil dock, service station area, looking seaward. The Exhibit G is a view, an aerial view of the dock looking toward shore. Exhibit E is a closeup of an area of the dock showing a tugboat alongside and the gas service station area in the center background.

Mr. Nave: I believe, if your Honor please, we should state that these particular photographs were taken some time after this explosion and it shows the dock after repairs had been made and does not show the condition that existed at the time of this particular incident.

Mr. Silvers: That's correct, but it does show the location of the gas service area.

The Court: May I look at them a moment?

Mr. Silvers: Surely.

Cross-Examination

By Mr. Silvers:

Q. Mr. Ray, you have marked on our Exhibit, Libellant's Exhibit 2, the location of the ladder that you climbed up after the explosion and which was in the vicinity of the tug Avila. Would you mark on the same diagram the position of the stern of the boat, of the tugboat, the position it was in at the time you were fishing from it. Just draw a straight line, if you would.

(Testimony of Garrett Ray.)

The Court: I think you better do it in pen [185] and then we will have a permanent marking.

Q. (By Mr. Silvers): Draw a straight line where the stern, the after end of the tug Avila was from which you were fishing, keeping in mind the position of the ladder you have already marked.

A. (Witness marking.)

Q. And would you write "stern"? Thank you.

From that position you told us you overheard a portion of a conversation between someone on the fishing boat and the Union Oil dock attendant on the gas service station dock; right?

A. Yes, sir.

Q. And the fishing boat man whom you heard speak was the man who was by the gas hose on the port side of the Santa Lucia, is that correct?

A. I couldn't say. I don't remember just what person it was that said it.

Q. In any event, it was a person on the port side of the Santa Lucia close to the gas dock?

A. Yes, sir; they were all—nobody was on the starboard side.

Q. And what you heard from the fishing boat was, "Have you given me my thirty gallons," in essence?

A. Yes, sir.

Q. And you heard the man on the dock reply, "I have given [186] you fifty or sixty already," is that correct?

A. Yes, sir.

Q. Now, did he say that in an excited tone of voice?

A. Well, the fellow that asked if he had given

(Testimony of Garrett Ray.)

him 30 gallons, he didn't, but the fellow on the dock who said he had given him 50 or 60 already, he more or less yelled in more than a normal voice.

Q. And did that appear to be an excited yelling?

Mr. Nave: I object to that, your Honor please.

The Court: This is really cross-examination, I suppose.

Mr. Nave: Yes, your Honor.

The Court: I am going to permit it. Objection overruled.

Q. (By Mr. Silvers): You may answer.

A. Well, I honestly don't remember, just doesn't hit me.

Q. Well, in any event, you heard what you call a strong yelling?

A. Yes; above the normal voice. I remember that.

Q. Pardon?

A. I say it was more than a normal voice.

Q. And immediately after he yelled, "I have given you 50 or 60 already," you saw him turn and head toward the back of the gas dock, is that correct? [187]

A. Yes, sir.

Q. He had gone just about six or seven feet from the edge of the dock where he had been standing when you observed this flash, is that right?

A. Yes, sir.

Q. And then seconds later you heard the explosion?

A. Well, about a second later.

Q. Or a second later. Now, calling your atten-

(Testimony of Garrett Ray.)

tion to the flash, Mr. Ray, you have told us that the flash was about fifteen feet in height?

A. Yes, sir.

Q. According to your recollection, is that correct? A. Yes.

Q. I would like you to tell me about how much of the flash you recall extending above the level of the dock where the Union Oil man had been standing? About how many feet above that was the flash that continued?

A. Well, close as I can remember, like I say, it was about 15 feet high and I would say five or six feet of it protruded from the level of the dock down and the remainder would go about, well, I'd say nine feet up from the dock.

Q. About nine or ten feet of the flash was above the level of the dock on which the Union Oil attendant had been standing, is that correct?

A. Yes, sir. [188]

Q. And approximately how far would the flash have extended, according to your best estimate, from the edge of the dock toward the port side of the Santa Lucia?

A. Well, from what I remember I'd say it was about, well, almost practically half way.

Q. Put it in feet for us, please.

A. Well, I would say about——

Q. About how many feet from the edge of the dock would the flash extend toward the Santa Lucia?

A. I'd say about six feet, maybe, roughly.

Q. About six feet from the edge of the dock, is

(Testimony of Garrett Ray.)

that correct? A. Yes.

Q. The flames that you first observed were flames that you saw when you were walking along the deck, or moving along the deck of the tug after you had jumped into the water and gotten back onto the tug and were moving toward the ladder to go ashore, is that correct? A. Yes, sir.

Q. And from that point on the tug Avila you were able to observe flames only in the area of the dock, the gas service dock, and not on the Santa Lucia, is that correct?

A. Yes, sir; there wasn't none on the boat.

Q. At that point you saw flames on top of the gas service station dock apparently at the base of those large tanks you [189] have pointed out to us, is that correct?

A. Yes, sir; they were—I could see fire under the dock and, like I say, on the upper part of the pilings and out toward the ridge of the dock where—well, out toward the ridge, the closest part to the boat.

Q. Then the next time that you recall seeing the flames and fire on the gas service dock was when you were doing some work in connection with the fire hoses back toward the main area of the dock, is that right? A. Yes.

Q. At that time you were still unable to see any flames at all on the Santa Lucia, but the fire on the dock had increased considerably, is that correct?

A. Yes; I could see the—oh, just about better than half of the Santa Lucia.

(Testimony of Garrett Ray.)

Q. I am going to show you Respondent's Exhibit E, Mr. Ray, and ask you if this shows the ladder that you came up after the explosion?

A. Yes; it is right there.

Q. You are pointing to a ladder in the upper center part of the photograph, is that correct?

A. Yes; the rails—has a rail on there.

Q. Was the stern position that you were in on the Avila before the explosion to the Santa Lucia side of that ladder?

A. What was that again? [190]

Q. Were you fishing from the stern from a point shoreward or the Santa Lucia side of the ladder you have just pointed to?

A. Yes; the ladder was on the side—the Santa Lucia was on. I didn't quite get that, I guess.

Q. Let me put it another way: How much, if any, of the tug Avila extended shoreward, in a shoreward direction from the ladder?

A. Past the ladder?

Q. Past the ladder.

A. Oh, I'd say it was about, oh, at least between fifteen and eighteen feet, I think.

Mr. Silvers: Those are all the questions I have. Thank you.

The Court: Any redirect?

Mr. Vartan: No, your Honor.

The Court: All right. Thank you.

(Witness excused.)

The Court: Next witness.

Mr. Vartan: Nino Tarantino.

NINO TARANTINO

one of the plaintiffs called as a witness in his own behalf, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [191]

The Clerk: Please state your name to the Court.

The Witness: My name? Nino Tarantino.

Direct Examination

By Mr. Vartan:

Q. Mr. Tarantino, what is your business or occupation? A. Fisherman.

Q. And how long have you been a fisherman?

A. All my life.

Q. How old a man are you, Nino? A. 67.

Q. You a married man? A. Yes.

Q. Any children?

A. Three; is all married.

Q. They are not living at home, is that right?

A. Yes.

Q. On September 28, 1954, you were working on the Santa Lucia, is that right? A. Yes, sir.

Q. How long before the Santa Lucia sank on this day had you been working on the Santa Lucia?

A. Oh, I'd say about seven, eight minutes.

Q. Seven or eight months?

A. No; I mean when it sink. [192]

Q. No; how long had you—

A. Fishing, oh, about eight, nine months, something like that.

Q. Eight or nine months. Now, Nino, if you don't

(Testimony of Nino Tarantino.)

understand—— A. Yes.

Q. ——you tell me. A. Yes, sir.

Q. Okay? A. Yes, sir.

Q. All right. You just answer the questions we ask you. Okay? A. Yes.

Q. What was your job during the eight months, or whatever time it was? A. On the winch.

Q. No, Nino; I want you to wait until we finish the questions, and then answer. Okay?

Now, what was your job on the Santa Lucia during the time that you worked those eight months?

A. On the winch.

Q. You were on the winch? A. Yes.

Q. I see. Did you have anything to do with the engines? A. No. [193]

Q. Did you have anything to do with the repairing of the engines? A. No.

Q. Or operating the vessel? A. No, sir.

Q. Nino, what time of the day did this happen?

A. The 28th, I guess.

Q. Yes; what hour? A. Five-thirty.

Q. I see. Was the sea calm—strike that.

Mr. Vartan: Your Honor, if there is no objection I will lead the witness.

The Court: You go ahead until there is an objection. I don't think counsel will object.

Mr. Vartan: No.

The Court: Let him tell us what happened.

Mr. Vartan: That is what I would like to do.

The Court: Go ahead.

Q. (By Mr. Vartan): Now, Nino——

(Testimony of Nino Tarantino.)

A. Yes.

Q. The ship Santa Lucia came to the gas dock and they tie up, right? A. Yes.

Q. Now, at that time were you working after tie-up, were [194] you working?

A. No; just wait to give the hose.

Q. I see. Did you help tie the vessel?

A. Yes.

Q. You helped with the ropes? A. Yes.

Q. And lines? A. Yes.

The Court: Where did you make the ship fast, what part?

The Witness: What part in the dock?

The Court: What line did you have, the stern?

The Witness: No; I have the winch line. The winch line.

The Court: The winch line?

The Witness: You see, and——

The Court: You pull it in on the winch?

The Witness: That's right.

The Court: I see.

Q. (By Mr. Vartan): When the ship came to the gas dock, Nino—— A. Yes.

Q. ——the Santa Lucia was tied to the dock?

A. Yes.

Q. With a line? [195] A. Yes.

Q. Now, did you, yourself, handle the line that tied up the Santa Lucia?

A. Everybody got, tied up; I helped, too.

Q. And you helped, too? A. Yes.

(Testimony of Nino Tarantino.)

Q. All right. After you tied up the Santa Lucia, what did you do then; where did you go?

A. We see first give it the hose. And then take, sweep—full of anchovies, pull it by the head, pull the heads off.

Q. You were knocking the heads of the anchovies off to get them out of the net? A. Yes.

Q. And that was a brail net? A. Brail.

Q. Were you doing that, too?

A. No, pull them up, the boys pull it up.

Q. In other words, the engines were turned off and you were turning the winch by hand?

A. That is right.

Q. If the engines were running how would you lift the brail net?

A. If the engines running, the men won't pull them up, pull up by winch.

Q. You won't need the men, then? [196]

A. No; no men at all.

Q. I see. After the Santa Lucia tied up at the gas dock did you hear a conversation—strike that.

Did you hear talk between anybody on the Santa Lucia and anybody on the gas dock? A. Yes.

Q. Now, tell his Honor what you heard; what did you hear?

A. I heard, "Give me thirty gallons of gas."

Q. Who said that? A. The skipper.

Q. What's his name? A. Cardinale.

Q. Frank Cardinale? A. Yes.

Q. Did you hear the man on the dock answer? What did he say?

(Testimony of Nino Tarantino.)

A. He said, "All right." And he give him the hose.

Q. Who did he give the hose to?

A. To the skipper.

Q. I see. Did you see what the skipper did with the hose? A. Put them in the tank.

Q. Where was the tank?

A. On the side—the dock.

Q. On the side of the vessel closest to the dock?

A. Yes. [197]

Q. Was it at the back end or forward?

A. The bow to the shore.

Q. It was toward the bow?

A. To the shore.

Q. Yes. When you say he put the hose in the tank, you didn't see the tank there?

A. No, no.

Q. Where did he put the hose, in a hole?

A. In the hole.

Q. I see. Did you then keep watching him?

A. No; we keep working.

Q. Then you went working?

A. We keep them working.

Q. Did you continue to watch Frank Cardinale after he put the hose in the hole? A. Yes.

Q. Did you keep watching him, or did you go to work?

A. No; Cardinale keep us on the work.

Q. He kept you on the jump, so you went working? A. Cardinale watch the hose.

Q. Now, what part of the vessel was the winch?

(Testimony of Nino Tarantino.)

A. In the middle of the boat.

Q. In the middle of the boat right back of the galley?

A. Yes. The other side of the tower house.

Q. I see. You were by the winch when something happened; [198] when this happened where were you?

A. It was in the line to wash your hands, you're all dirty, all stink of fish. All at once blow off the boat and then I don't remember anything no more.

Q. Now, you say you were waiting in line to wash your hands?

A. Yes.

Q. Before the explosion took place?

A. Yes.

Q. And you say your hands were stinky with fish, is that what you mean?

A. It was blood; the boys all dirty coming to work and wash your hands.

Q. You were waiting to wash your hands?

A. Yes.

Q. All right. When the explosion took place, Mr. Tarantino, how many noises did you hear?

A. I heard two noises.

Q. In your own way tell the Judge just what you did hear, say it, tell us in your own way.

A. I heard this way: I feel my feet going and then uuummmm UUUMMM—BOOM!

The Court: Indicating a roaring sound followed by a boom or an explosive—which might be indicative of an explosion. R-o-a-r—BOOM!

The Witness: uuummmm UUUMMM—BOOM!

(Testimony of Nino Tarantino.)

The Court: A roaring noise the witness is giving.

Q. (By Mr. Vartan): Now, did you hear more than one of those or two of those?

A. Two. This way I saw myself uuummmm UUUMMM—BOOM! And then I don't know nothing at all.

Q. All right. Were you standing up when that happened? A. No.

Q. Before it happened were you on your feet standing up in line?

A. Before I stand in line.

Q. All right; what happened to you when that happened, when you heard those two noises, whatever you described, what happened to you? Did you fall down?

A. I fall down, somebody, I don't know, helped me. I never know. It is all full of wood. I have this arm is all like that; can't move; my face is all full of water, blood. I don't know what happened.

Q. All right. Now, did you say Horace helped you up, Horace Adagio helped you?

A. I never hear, who?

Q. Did you say that Horace Adagio helped you up? A. Yes; that's right.

Q. That's the French boy? [200]

A. Frenchie.

Q. When you got up did you notice any fire any place?

A. I see all the dock all afire, all the dock is on fire.

(Testimony of Nino Tarantino.)

Q. At that time did you notice or see any fire on the Santa Lucia?

A. No; never got started at that time.

Q. I see.

A. Never get started. I see the boat sink, but I never see fire.

Q. All right.

A. I see all the dock all afire, scared.

Q. The dock was on fire? A. All afire.

Q. And when you saw the dock on fire did you see any fire at that time on the Santa Lucia?

A. No; I don't see. After we see.

Q. Afterwards?

A. After, when we take the skiff and we go take the skiff, going to help little, little by little, then we come up, some boys help. I don't know who it is and then they give a hand.

Q. All right. But it was after you were—everybody was in the skiff and you left the Santa Lucia in the skiff, is that right? A. I never hear.

Q. After this happened—— [201]

A. Yes.

Q. The boys, you and the other boys got into the skiff, right? A. Yes.

Q. And you started rowing away? A. Yes.

Q. And is that when you saw some fire on the Santa Lucia? A. Yes; then we saw the fire.

Q. That is the first time?

A. First time; then we saw it on fire.

Q. I see. There is no dispute on this. You were

(Testimony of Nino Tarantino.)

taken to the French Hospital in San Luis Obispo, right?

A. Yes; I don't know what hospital is it; that is a long time.

Q. All right. And you were there three days, is that right? A. Three days; two or three days.

The Court: Were you in bed all that time?

The Witness: Yes.

The Court: Did you have any pains?

The Witness: Huh?

The Court: Any pain?

The Witness: Pain, yes.

The Court: Where?

The Witness: Had pain in my arm. [202]

The Court: Indicating his left forearm in the vicinity of the elbow.

The Witness: Right in my face.

The Court: What part of your face?

The Witness: This (indicating).

The Court: Indicating the left side of his face just in front of his ear.

Q. (By Mr. Vartan): Any place else?

A. That's all, I guess.

The Court: Did the doctor put anything on your face?

The Witness: No, my wife was taking care of me, and my daughter.

The Court: Did the doctor do anything for your arm?

The Witness: No, I was broke, because somebody

(Testimony of Nino Tarantino.)

make a scare, going to pay all the bills. (Balance of answer unintelligible to Reporter.)

Mr. Vartan: I show counsel a photostatic copy of the records of the French Hospital, your Honor, and also a statement for services rendered at that hospital.

The Court: Any objection?

Mr. Nave: I would like to examine them, your Honor, please.

The Court: Received in evidence and if you have any objection you can state it on the record [203] later.

Mr. Nave: Very well.

The Clerk: Libelant's Exhibit 4 introduced and filed into evidence.

(Whereupon the foregoing medical records and statement were marked and introduced into evidence as Libelant's Exhibit No. 4.)

The Court: Turn around. Let me see the left side of your face.

The Witness: Now it is all right.

The Court: Now it is all right?

The Witness: Now it is all right.

The Court: No pain?

The Witness: No. When weather is bad, maybe I get pain this arm.

The Court: Once in a while in rough weather he gets pain, indicating his left elbow.

The Witness: When it rain or change of weather.

(Testimony of Nino Tarantino.)

The Court: How old are you now? Sixty-seven?

The Witness: Sixty-seven.

The Court: You get any pains any place else when it rains?

The Witness: No. Well, sometimes.

The Court: Sometimes.

The Witness: I know I never have it [204] before.

The Court: Never had the pain in the elbow before?

The Witness: No.

The Court: Did you have any pain in any other part of your body when it rained before?

The Witness: When it rain, my back, some time.

The Court: How long have you had the pains in your back?

The Witness: Oh, since this accident.

The Court: Not before?

The Witness: No.

The Court: The Court upon the record observes there is no mark or scar on the left side of his face in the portion indicated.

Mr. Vartan: Yes, your Honor.

The Court: Of the witness. You got any mark on your arm?

The Witness: I got no mark.

The Court: No mark?

The Witness: No, no mark. It bother me with the change or gets foggy, when it rain or it get chill.

(Testimony of Nino Tarantino.)

Q. (By Mr. Vartan): Did you have any headaches after this?

A. I had headache, I got all the time still.

Mr. Vartan: This is the man, your Honor, for the record, that claims that—I want to give him his day in [205] Court.

The Court: Well, the hospital record says “Left forearm no significant abnormality noted,” that’s the X-ray report.

Mr. Vartan: Yes, that’s true, no fracture claimed.

The Court: The preliminary diagnosis on admission speaks of multiple contusions and abrasions of left elbow, multiple contusions on the face. Let’s just see what it says.

Doctor’s examination records in this Exhibit simple ecchymotic condition around the left elbow, that’s black and blue marks, and tender posteriorly and abrasions to the left cheek. These hospital records don’t note or record any substantial or serious injury.

Mr. Vartan: That’s right, your Honor.

The Court: It is stipulated that this bill of the San Luis Clinic is reasonable in amount?

Mr. Silvers: Yes, your Honor.

The Court: All right.

Q. (By Mr. Vartan): Now, Nino, how long after this happened did you return to work?

A. Oh, I don’t know, one month.

Q. Who did you work for? A. Romeo.

Q. Sal Romeo? [206] A. Yes.

(Testimony of Nino Tarantino.)

Q. So you're away from work one month, is that right? A. Yes, sir.

Q. How much money did you lose because you didn't work that month?

Mr. Nave: We object to that.

The Court: Objection sustained. How much were you getting aboard the ship, the Santa Lucia?

The Witness: How much I make?

The Court: How much were you receiving, what were you getting there, were you working on a share?

The Witness: Yes, work on a share.

The Court: How much did you draw as your share a month?

The Witness: By the month at the time I never make much money.

The Court: How much?

The Witness: I think I make about a hundred dollars.

The Court: How much did you get from Romeo when you went to work for him?

The Witness: I work about \$800.00.

The Court: \$800.00 for how long?

The Witness: Oh, about one month.

The Court: How many?

The Witness: One month. [207]

The Court: \$800.00 in one month?

The Witness: Yes.

The Court: Where did you work on Romeo's ship?

The Witness: Work in San Pedro.

(Testimony of Nino Tarantino.)

The Court: Where?

The Witness: I don't know, I can't remember now, I work San Pedro.

The Court: San Pedro?

The Witness: San Pedro or Santa Barbara, one of the two, a long time ago, I don't remember.

The Court: Did he pay you by check?

The Witness: He paid by check.

The Court: What happened after you came out of the French Hospital; you went there for three days? Then what did you do after that, go home?

The Witness: I go home.

The Court: Yes. And what did you do at home?

The Witness: We go to bed.

The Court: At night?

The Witness: Yes, I go to bed because I was sick.

The Court: Did you go to bed in the day time?

The Witness: Huh?

The Court: Did you stay in bed in the day time?

The Witness: Yes, in the day and night.

The Court: How many days did you stay in bed? [208]

The Witness: Oh, I think over two weeks.

The Court: In bed?

The Witness: In bed.

The Court: Did you have a doctor?

The Witness: No.

The Court: No doctor.

The Witness: No. People make me scared, say

(Testimony of Nino Tarantino.)

you going to pay on this bill and I didn't want to pay.

The Court: Did you have any pain while you were in bed?

The Witness: Yes.

The Court: Where did you have the pain?

The Witness: The pain in my head and my back and my face and my arm.

The Court: You interrogate him, counsel, I don't wish to do this.

Mr. Vartan: Yes.

The Court: I want to find out what treatment he had, if any, during that month that he didn't work, what pains he experienced, what efforts he made to go to work during that time. I suggest you inquire about it.

Q. (By Mr. Vartan): Now, Nino, after you were in the French Hospital three days you came home, is that right? A. Yes. [209]

Q. In answer to His Honor's questions, you stayed in bed about two weeks? A. Yes.

Q. During that time did you feel pain, were you sick any place? A. Yes, I was sick; yes.

Q. All right, tell us where, what parts of your body.

A. My arm, my face, can't eat, my back, my head.

Q. Nino, on your face, when you left the French Hospital, did you have any mark on your face?

A. Yeah, I got a big mark, I got a big crust.

(Testimony of Nino Tarantino.)

Q. A big crust? How long did that crust stay on your face?

A. Oh, it stay about—well, it stay about ten to fifteen days, maybe a month.

Q. Did it still hurt after the crust was gone?

A. I don't know now, but the trouble they give me I had with my back and arm.

Q. I see. Now, you said you did not have a doctor during the month that you were away from work?

A. No.

Q. Why didn't you have a doctor?

Mr. Nave: Object to that question.

The Witness: People make me scared——

The Court: Overruled, he may answer. He is a seaman. [210]

The Witness: People make me scared I have to pay the bill and the people——

Mr. Nave: I am sorry, your Honor, I didn't understand that.

The Court: He says the people made him scared, he had no money to pay the bill and he no go.

Q. (By Mr. Vartan): Is that right?

The Court: When you went to work for Romeo what did you do aboard Romeo's ship, what work did you do there?

The Witness: We work on the red light, red light work.

The Court: Did you handle the nets on Romeo's ship?

The Witness: Yes, handle the nets, haul in the fish.

(Testimony of Nino Tarantino.)

The Court: You hurt in the face on Romeo's ship?

The Witness: No, I work my fish, then take it easy, take it easy.

The Court: Well, what did you do when you were on Romeo's ship, what work did you do?

The Witness: I work in the net.

The Court: What did you do on the net?

The Witness: Pull the line. [211]

The Court: Which hand?

The Witness: Pull the line, pull them up by both, everybody pull——

The Court: You pulled——

The Witness: Pull them up by pulling and then pull them up by hand.

The Court: Pull them up by hand? You took one of the lines on the net——

The Witness: Yes.

The Court: ——and pulled up the net, the red light?

The Witness: Dragline.

The Court: Oh, dragline.

Q. (By Mr. Vartan): Now, Nino, you said when you went to work following this occurrence you worked for Sal Romeo; what were you fishing for? A. Before?

Q. No, after one month you went to work for Sal Romeo; right? A. Yes.

Q. And you went down toward Santa Barbara and San Pedro; right? A. Yes.

Q. What kind of fish were you catching?

(Testimony of Nino Tarantino.)

A. After, I stay home, I stay home and never work. [212]

Q. No. When you worked for Sal Romeo after the Santa Lucia blowup—— A. Yes.

Q. ——you worked for Sal Romeo; right?

A. Yes.

Q. What kind of fish did you go for?

A. Oh, sardines.

Q. Was that a good season?

A. Well, you make good money.

Q. How much did you make?

A. Well, I made \$800.00, then I have to quit.

Q. How much time?

A. Oh, one month, maybe a little more. That is a long time.

Mr. Vartan: You may cross-examine. [213]

Cross-Examination

By Mr. Nave:

Q. Mr. Tarantino, when did you first go to work for Mr. Cardinale?

A. We go to work before I get—about three months before I started to go to San Pedro, about three months.

Q. How long before this explosion, this fire and explosion, how long before that was it that you went to work? A. About three months.

Q. About three months.

A. We fish Monterey and we got to San Pedro, we go to Santa Barbara.

(Testimony of Nino Tarantino.)

Q. Do you remember what month you went to work for Mr. Cardinale? Was it June or July, or what month was it?

A. Well, let me see. I cannot remember exactly, but I know about three or four months, three months, not exactly, working the vessel, be a little over.

Q. About three months before this explosion you had gone to work on the Santa Lucia?

A. Yes.

Q. And your job on the Santa Lucia was handling the net? A. No, on the winch.

Q. The winch? A. Yes.

Q. I see. During those three months before this explosion, [214] had you been fishing every day?

A. The boat?

Q. Yes.

A. When they fish, we go fish, I don't know we go every day, or go three or four times a week.

Q. During that three or four months before this explosion, did you do any work on the fishing boat Santa Lucia? A. Sure, I did.

Q. Well, I know you were fishing, but did you do any repair work? A. Work, yes, fishing.

Q. I understand, but what I mean is did you do anything painting the boat, did you paint the fishing boat?

A. No, I never paint a boat, I was carrying the net, fix the net. I got nothing to do with the painting.

(Testimony of Nino Tarantino.)

Q. You did then do some work during that three months in repairing the boat, did you?

A. I don't know what happened to the skipper, but I know when we go fishing, we go fishing.

Q. All you did was you worked fishing?

A. Fishing, that is all.

Q. You didn't have anything to do with any repairs to the boat? A. No.

Q. Now, during that three months' period before this [215] explosion, do you know of any repair work that was done on the Santa Lucia?

A. No, I got nothing to do with the boat.

Q. Did you see any work done?

A. No, I just, my job is go fix the net.

Q. I see. And what had you been fishing for during those three months, what kind of fish?

A. Anchovies.

Q. Anchovies? A. Yes.

Q. Where did you go?

A. Where did you go what?

Q. Where did you go to fish?

A. Outside the breakwater.

Q. Out of Monterey? A. No, it is Avila.

Q. Avila? A. Yes.

Q. How long would you stay out at sea before you would come back to Monterey during that three-month period?

A. Depending on the fish; we got a lot of fish, we stay, come back to Avila; we got no fish, maybe six, seven or eight, ten hours.

(Testimony of Nino Tarantino.)

Q. When you got a catch of fish, do you take it into Avila? [216]

A. Yes.

Q. And then you go back out again, fish some more?

A. If you want to fish, we try to make it, if you don't—

Q. Fine. Then would you go back to Monterey?

A. No, the anchovies—go to Monterey and we stay over there and very soon the sardine season opens, we stay over, the whole group.

Q. But pretty near every day during that three months you were out fishing somewhere, is that right?

A. Well, I can't tell exactly, when we fish, we go fish, maybe three or four days, maybe a week, maybe one.

Q. You would stay out three or four days, maybe a week and then you would come back?

A. No, three or four days, go home every night.

The Court: Every night. He would go out three or four times a week; the other days, no good weather, no good fishing, you stay home.

Mr. Nave: Thank you, your Honor. I didn't understand it.

The Witness: Yes.

The Court: Yes.

Q. (By Mr. Nave:) Now, had you ever been in the engine room of the Santa Lucia?

A. No. [217]

(Testimony of Nino Tarantino.)

Q. You never been down below decks at any time?

A. I got no business, Mister, to go over there, my business is in the nets.

Q. Who was the cook, who cooked the meals on the fishing boat?

A. The cook is Tony Belleci.

Q. Belleci? A. Yes.

Q. You had meals on that fishing boat, did you?

A. I don't know nothing about the cook, I work on deck, I don't know anything about it. When they cook the meals, the bell, we go eat, he don't ring the bell, we don't go eat.

Q. Well, now, on the day of this explosion——

A. ——at night we had the big meals.

Q. On the day of this explosion did you have something to eat in the galley? A. No.

Q. Did you have any coffee in the galley?

A. Never had a drop of water.

Q. You had what?

The Court: Didn't have a drop of water.

Did you have a drop of vino, of wine?

The Witness: No.

Q. (By Mr. Nave): You weren't in the galley at any time on the day of [218] this explosion?

A. No, the engine, we got it stopped, because make the gasoline, got no business to cook over there, see.

Mr. Nave: I will confess I couldn't understand it.

The Court: He gave a good answer. He says the

(Testimony of Nino Tarantino.)

engine stop, we take on gasoline and got no business to cook when you take on gasoline; is that right?

The Witness: Yes, sir.

(The Court speaking to the witness in Italian; unintelligible to the Reporter.)

Q. (By Mr. Nave): Well, I am speaking now of early in the morning. Did you have breakfast on the Santa Lucia, did you have coffee or anything at all?

A. No.

Q. I am not talking about the——

A. That is all right, we wait, when we work, we work fishing, but no cook.

Q. No coffee?

A. I don't know if he make coffee, but when we work, we got to make a few dollars to eat.

Q. I appreciate you like to make a few dollars, but were you in the galley at all at any time on the morning before this explosion took place?

A. When they outside the dock, we go eat, the coffee, we [219] go to eat.

Q. You did eat?

A. Why, sure. Not on the dock.

Q. On the dock?

Mr. Vartan: No, counsel, he says eat outside the dock, before we come to the dock.

The Court: Don't get exited now. He is having a little difficulty in understanding the witness.

Mr. Nave: Yes, your Honor. I am not trying to be unfair.

(Testimony of Nino Tarantino.)

The Court: Of course, you are not.

Mr. Vartan: I didn't intend to infer——

The Court: Next question.

Q. (By Mr. Nave): So that I understand—
please understand I have a lot of difficulty in understanding you.

The Witness: That is all right.

Q. You had breakfast that morning at Avila, did you? Is that right?

A. No, I never had no breakfast, we go to—
have a cup of coffee when we go out, we got no
right to cook coffee when on the dock, especially
when they make the gasoline, the stove is completely dead.

The Court: He says it's very stupid to do that
then; is that right? [220]

The Witness: We no got no right to cook because it is dangerous.

(Balance of answer unintelligible to the reporter.)

The Court: All right. Do you have any more questions of this witness?

Mr. Nave: Yes, I have, your Honor.

The Court: Go ahead.

Mr. Nave: If I may be permitted.

The Court: Yes, take your time.

Q. (By Mr. Nave): Now, the gasoline tank on the fishing boat blew up, didn't it?

A. I don't know it blew up. I see the dock is all

(Testimony of Nino Tarantino.)

afire, all I know blow up, but I know the dock is all afire.

Q. No, my question is——

A. My question, I don't know nothing about the blow up the tank. I see the dock is all afire, that is all I can say.

Q. Did you see any fire on the boat at all at the time the gasoline tank blew up?

A. We see five, seven, ten minutes, I see the fire, maybe it was like this, and I get up, I get up like that, and I see all the fire, I don't know, all I know is what I heard, the noise, see, my feet come weak, and then all the noise.

(Court conversing with the witness in Italian.)

Mr. Nave: Page 30 of Mr. Tarantino's deposition, counsel. [221]

Mr. Vartan: May it be understood that this deposition was taken without an interpreter?

Mr. Nave: Very well.

Mr. Vartan: And it was your deposition.

Mr. Nave: Very well.

Q. (By Mr. Nave): Mr. Tarantino, you remember when your deposition was taken on August 25, 1956, and I asked you some questions about what happened?

The Court: It is my custom when you use a deposition to mark it for identification.

Mr. Nave: I will, your Honor.

The Court: All right.

(Testimony of Nino Tarantino.)

Mr. Nave: Very well.

Q. (By Mr. Nave): I asked you this question and you gave this answer:

“Question: The boat was on fire?”

To which you answered:

“That is all on fire.”

The next question was:

“The boat was on fire?”

“Answer: Yes.”

The Court: Were you asked that question and did you make that answer?

The Witness: I asked about five, six, seven [222] minutes, no momentary fire, I asked the question, five, six minutes, then fire, that is correct.

Q. (By Mr. Nave): The next question:

“Where was the fire coming from on the boat?”

“Answer: From where you made the gasoline.”

Did you answer that question that way?

A. What is the question, let me understand it, maybe.

Q. “Question: Where was the fire coming from on the boat?”

To which you answered:

“From where you make the gasoline.”

A. The fire coming from the dock.

The Court: Did you answer that question that the lawyer read to you in the manner in which he read it?

The Witness: What is your question, please?

The Court: “Question: Where was the fire com-

(Testimony of Nino Tarantino.)

ing from on the boat?" Remember the lawyer asking you that question?

The Witness: It blow up at the dock.

The Court: Just one minute. Do you remember the lawyer asking you this question: "Where was the fire coming from on the boat?" Remember he asked you that question?

The Witness: Well, that's a long time ago, my gosh, see, that is a long time. [223]

The Court: Do you remember making this answer to that question?

The Witness: What did I answer?

The Court: "From where you make the gasoline."

The Witness: Make the gasoline at Avila.

The Court: No, on the boat.

The Witness: Not on the boat, on the dock.

The Court: Is that where the fire came from?

The Witness: No, I see the dock is all fire.

(Court and the witness speaking in Italian.)

The Court: Now, were you asked this question then by the lawyer:

"Question: Where the gasoline tank was?"

And did you make this answer?

"Gasoline tank it blew it up."

Did you say that?

The Witness: I never remember.

The Court: All right. Then did he ask you this question?

"Question: Blew up the deck?"

(Testimony of Nino Tarantino.)

And did you answer?

“Blew up all the boat.”

Did you make that answer?

The Witness: (Answer unintelligible to the reporter.)

The Court: He says, I don't know, I don't understand very much these words.

Is it conceded that that is the recorded interrogation and answer of this witness?

Mr. Vartan: Yes, to that limited extent, your Honor.

The Court: All right.

Q. (By Mr. Nave): Did you receive any burns on your face or in your hair at the time of this explosion? A. No, my face and my arm.

Q. Did you get a burn, your face get a burn on it? A. No.

Q. I call attention to the deposition, page 29, the top of the page, first question. I asked you this question at the time your deposition was taken, to which you gave these answers:

“Question: Did you receive any burns to your face or your hand?”

To which you answered:

“My face was all burn him up here, my head, my arm.”

Did you answer that?

A. No, I never said that.

Q. You didn't say that. All right.

The Court: Counsel, may I call your attention to the fact that Libelant's Exhibit 4, which is the hos-

(Testimony of Nino Tarantino.)

pital record, [225] has a notation on the first page:
"Flash burns on arm and face."

Mr. Nave: Very well, your Honor.

I have no further questions. Thank you.

Cross-Examination

By Mr. Silvers:

Q. Mr. Tarantino, you knew there was a gasoline tank on the dock, didn't you, from where the gasoline came?

A. The gasoline on the dock, yes.

Q. You knew there was a gasoline tank on the dock?

A. Yes, that's correct.

Q. When you say "From where you make gasoline," you mean from the dock?

A. Yes, that's right.

Q. Isn't that what you mean?

Mr. Nave: I object to that, if your Honor please, that is improper cross-examination.

The Court: Overruled. We will permit it in view of the witness' limited acquaintance with the language.

Q. (By Mr. Silvers): You saw the fire coming from where they make gasoline on the dock, isn't that right?

A. From the dock it come, the fire. I don't know from where. I see it all go foolish. I no know where it came from.

Mr. Silvers: I have no further questions. [226]

The Court: Any redirect?

(Testimony of Nino Tarantino.)

Redirect Examination

By Mr. Vartan:

Q. Counsel read certain portions of the deposition, page 52, line 16:

“Question: Did you give”—in the same subject that counsel pointed out in the deposition, Mr. Tarantino, did you give this answer to this question?

“Question: Right. Now, when you looked and saw the dock all on fire were you lying on the deck or had you gotten up?

“Answer: When the dock is explode up, boat explode up, what’s the—I don’t know what’s the matter, I get up, I can’t open my eyes.”

Did you give that answer to that question?

A. Yes.

Q. In other words, you saw the dock fire first?

A. Yes.

Q. And several minutes later when you were in the skiff leaving——

Mr. Nave: I object to the wording, leading and suggestive——

Mr. Vartan: Well, we are under difficulties.

The Court: Overruled. This man is a seaman, he is [227] a ward of the court. I am going to permit considerable liberality.

Q. (By Mr. Vartan): Mr. Tarantino, the first explosion happened, you fall down, right?

A. Yes.

(Testimony of Nino Tarantino.)

Q. When did you see the fire on the dock, when you were still down or when you were getting up?

A. No, when it was, when I get up, after five, six minutes, the boat is all done, the power house.

The Court: The witness is testifying that after he was thrown to the deck by the explosion, he laid there and twisted for several minutes, is that correct?

The Witness: That's what I——

The Court: You went to the deck?

The Witness: Yes.

The Court: And you lay there?

The Witness: Yes.

The Court: And you don't know how long you lay there?

The Witness: No, I don't know.

The Court: When you get up you got the pain in the face, pain in the elbow, pain in the back?

The Witness: I can't move.

The Court: And then you look and that's when you see the fire? [228]

The Witness: That's right.

Mr. Vartan: All right.

Q. (By Mr. Vartan): Now, where was the fire that you saw then? A. I see first on the dock.

Q. All right. You were still on the boat when you saw the fire on the dock. You are sure of that?

A. Yes, I was in the boat.

Q. All right. Then you left the boat and you got into the skiff? A. The skiff.

Q. The skiff. And you were leaving the boat?

(Testimony of Nino Tarantino.)

A. I leave the boat.

Q. When you were leaving the boat, did you see fire on the Santa Lucia?

A. Yes, all afire.

Q. How far were you away from the Santa Lucia when you first saw fire on the Santa Lucia?

A. Oh, I don't think very far. (Further remarks unintelligible to the reporter.) Joe is dead.

Q. One of the attorneys, Mr. Tarantino, they read something in the deposition where you said something about the gasoline tank exploding. Did you see the gasoline tank of the Santa Lucia explode? Did you know it was a gasoline tank?

A. I don't know what—— [229]

Mr. Nave: Objected to, your Honor, as leading and suggestive.

The Court: Yes, I am going to sustain that.

Mr. Vartan: Well, our position——

The Court: This man knows what a gasoline tank is, he has been around, told us how you mustn't smoke when gasoline is being loaded.

How many gasoline tanks are on the Santa Lucia? How many?

The Witness: One, one smaller tank, 30 gallons.

The Court: One small tank, 30 gallons.

The Witness: That is right.

The Court: Any big tank?

The Witness: No.

The Court: Only one?

The Witness: Only one.

(Testimony of Nino Tarantino.)

The Court: Where was that on the ship?

The Witness: She sank—I say Frank get the hose.

The Court: No, where was the tank on the ship, where was the gasoline tank?

The Witness: Down below.

The Court: Down below. Below what part of the ship?

The Witness: I don't know.

The Court: You don't know. You know if there were two tanks on the ship? [230]

The Witness: No.

The Court: You don't know. Okay.

Mr. Vartan: It will be admitted, counsel, this is a Diesel fuel vessel; the gasoline tank is an auxiliary tank, your Honor.

The Court: There was another tank aboard the ship?

Mr. Vartan: But not gasoline, your Honor.

The Court: Diesel oil?

The Witness: Diesel oil.

Mr. Vartan: Large tanks were for Diesel oil?

The Witness: No gasoline.

Mr. Vartan: No gasoline.

The Court: Any kerosene, have kerosene on the ship?

The Witness: What you mean?

The Court: How you cook, how do they cook?

The Witness: They cook with the Diesel.

The Court: How they cook in the galley, what did he use to cook with?

(Testimony of Nino Tarantino.)

The Witness: Diesel.

The Court: Diesel oil.

The Witness: Yes, Diesel.

The Court: All right.

Q. (By Mr. Vartan): Now, you said it was stupid to cook when making gasoline. Now, when this Santa Lucia was making gasoline, did you see [231] anybody actually cooking food in the galley? A. No, no cooking.

Mr. Nave: I object to that type of examination. The witness stated he wasn't in the galley at any time.

The Court: Well, he can say what he saw. Overruled. He has answered, and he says no.

Mr. Vartan: That's all, now. How do you feel now?

The Court: All right, thank you.

(Court speaking to the witness in Italian.)

The Court: You didn't know I spoke Italian, did you?

Mr. Vartan: Still don't, your Honor. I can't understand it. We will all be talking like Nino before long.

The Court: Now, you want to take the recess for lunch?

Mr. Vartan: Yes.

The Court: How long will you gentlemen take for lunch out here? You want an hour and a half?

Mr. Vartan: I think 2:00 o'clock today, we

are running faster than we thought with these witnesses.

The Court: You are going to run faster in the future. I tell you what I suggest, come inside in chambers—we will adjourn 'till two, but come in chambers, I would like to talk to you lawyers a moment.

(Thereupon an adjournment was had until 2:00 o'clock p.m. this date.) [232]

Afternoon Session—2:00 o'Clock P.M.

Mr. Vartan: Your Honor, I am sorry we didn't catch you before you took the bench. We wanted to talk to your Honor about certain matters before court convened.

The Court: All right, we will go across the hall to chambers.

(Short recess.)

The Court: I understand that counsel wish to place upon the record disposition of the four libels filed on the so-called wage claims.

Mr. Vartan: Yes, your Honor, counsel for Libelants and counsel for both Respondents, rather, Union Oil and Cardinales, have agreed that the wage claims in this matter involving Horace Adagio, Francois Cardinale, Sal Romeo and Joseph Romeo may be compromised and disposed of for a sum payable to each in the sum of \$125.00.

The Court: Is that approved by both of the Respondents, consented to?

Mr. Silvers: Yes, it is.

The Court: The Court has examined into these claims. They are not really wage claims; they are claims filed by these seamen for the benefits of, say, contractual obligations which the ship had incurred to them in reference to voyages which were to be taken in the future, fishing voyages of short duration. [233]

I have examined into these claims and I feel that these settlements which have now been reached are fair, just and equitable, and accordingly the Court then will sign a decree dismissing these libels upon consent upon payment to the Libelant in each case of \$125.00 each.

So that we may have it upon the record, that will be in File No. 27156, which is the libel filed by Joseph F. Romeo against Union Oil Company of California, Frances E. Cardinale and Idalene Jenner Cardinale, et al.; File No. 27157, which is the libel filed by Salvatore Romeo against the same Respondents; and File No. 27158, which is the file number of a libel filed by Francois Cardinale against the same Respondents; and File No. 27159, which is the file number of the libel filed by Horace Adagio against the same Respondents.

These suits are now marked settled, a decree will be signed by the Court dismissing these libels upon the merits upon payment of \$125.00 to each of the Libelants.

All right, proceed now with the other trials which we have before us.

Mr. Vartan: The Libelants will call Sal Romeo to the stand, please.

The Court: I understand it is further understood by the settlement of these suits, the Respondents are not deemed to have admitted any liability on either of these claims or any other claims, and the settlements are not to be considered [234] by the Court in any way as an admission of liability with respect to the other libels which are filed. Is that the understanding?

Mr. Vartan: Yes, your Honor.

Mr. Silvers: Yes, your Honor.

SALVATORE ROMEO

called as a witness on behalf of the Libelants, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court?

The Witness: Salvatore Romeo.

Direct Examination

By Mr. Vartan:

Q. Mr. Romeo, what is your age, please?

A. 61.

Q. What kind of work have you done during your lifetime? A. Fishing.

Q. That has been your main livelihood, has it?

A. Yes.

Q. On September 28, 1954, the day when the Santa Lucia had this difficulty at the Union Oil dock, were you employed on the Santa Lucia. [235]

(Testimony of Salvatore Romeo.)

A. I was the fishing captain.

Q. You were the fishing captain. And who was the owner and operator of the boat?

A. Cardinale.

Q. That's Frank Cardinale?

A. Frank Cardinale.

Mr. Vartan: With your Honor's permission, we will omit the preliminaries and get to the meat of the thing.

Q. (By Mr. Vartan): As the Santa Lucia reached the gasoline dock, where were you?

A. On the wheel.

Q. Where was Frank Cardinale?

A. On the control.

Q. He was right next to you?

A. Next to me, yes.

Q. Who asked you or directed you to bring the Santa Lucia to the gas dock?

A. Frank Cardinale.

Q. All right. As the Santa Lucia approached the main wharf, not the gas dock, but the main wharf——

A. Yes.

Q. ——of the Union Oil Company, did Frank Cardinale say anything to anybody on the Union Oil wharf?

A. What do you mean? [236]

Q. I mean, did he ask for anything when he first saw the man at the big part of the wharf?

A. He asked for gasoline.

Q. Did he say how many? A. 30 gallons.

Q. After that, your vessel tied up, did he not?

A. That's right.

(Testimony of Salvatore Romeo.)

Q. After the vessel tied up, where did you go?

A. On deck.

Q. What was your purpose in going on deck?

A. Talk with the fishermen.

Q. You mean the crew?

A. The crew, yes.

Mr. Nave: Your Honor, may I have permission to sit up here?

The Court: Yes, surely, come right over.

Q. (By Mr. Vartan): When the Santa Lucia tied up at the gas dock, did you hear Frank Cardinale have any talk or conversation with anybody on the gas dock before the hoses were handed down?

A. He asked the guy for 30 gallons of gas.

Q. What did the guy say?

A. He said, "Do you got any credit card?" And Frank, he handed it to him.

Q. And then what happened? [237]

A. And he handed the card, it was expired.

Q. The card had expired?

A. Expired, so he told him, "I pay cash." After that he say, "Okay, okay."

Q. The Union Oil man said "Okay, okay." You offered to pay cash if the credit had expired?

A. That is right.

Q. Later on did the man on the Union Oil dock say Cardinale's credit was okay? A. Yes.

The Court: Now, what did you see happen, what happened after that? Tell us.

The Witness: Wait a minute. What you mean?

The Court: You pulled up to the dock.

(Testimony of Salvatore Romeo.)

The Witness: We tie up.

The Court: You tie up?

The Witness: That is right.

The Court: Frank asked for gas.

The Witness: Yes.

The Court: Handed him credit card.

The Witness: Yes.

The Court: Now, tell the rest of the story.

The Witness: Well, I went up on deck. You understand what I mean?

The Court: (Court talking in Italian.) [238]

The Witness: I went on the deck, I talk to the crew, to wash the boat. Frank came up to get the gas.

After that, about ten minutes, I hear the gasoline man, he holler, "Frank, I give you fifty-eight and a half gas." And Frank hollered, "Jesus Christ, what hell you doin' with the gas?"

Q. (By Mr. Vartan): Wait awhile. Wait awhile.

The Court: He is doing very well.

Mh. Vartan: All right.

The Witness (Continuing). And myself, I was like this, I turn around, I don't see nobody——

The Reporter: I am sorry. I didn't hear that.

The Court: "I was like this (in a crouched position), I turned around, I didn't see anybody, but I only heard a voice."

The Witness: That's right. After that, two minutes, boat go away, boom—boom. I don't know anything about it.

(Testimony of Salvatore Romeo.)

Q. (By Mr. Vartan): How many booms?

A. Two times.

Q. How much time passed between the first boom and the second boom? You say two booms and then you wait between the booms just like you heard it, so the Judge can know? [239] A. Yes.

Q. Now, take your time and figure out how much time between the two booms.

A. Only a second boom, boom ba-boom, and then the house come over on top of me. The only thing that saved me was the door.

The Court: What came with the door? The door hit you?

The Witness: The door saved me.

The Court: Oh, the door saved you.

The Witness: Otherwise, I was all to pieces, because the whole power house, the cable, net, and everything, was on top of me. Everything was just like that (indicating).

The Court: Indicating crouched and bent down.

The Witness: After two minutes like that I hear the cook holler, "Help me, help me," he can't get out. I take one hand like this, take it out and——

The Court: He says, "I helped myself like this," indicating still crouched over in a crouched position, and moving his left hand as if to move some debris or material from his left side.

The Witness: That's right.

The Court: Go ahead. What happened then?

The Witness: After that the cook go away, I run myself, too. [240]

(Testimony of Salvatore Romeo.)

The Court: After that the cook went away and you, too, ran.

The Witness: I run, too.

The Court: Where did you run?

The Witness: As soon as I leave the hatch—as soon as I reach the hatch——

The Court: As soon as he reached the hatch.

The Witness: The hold with the fish——

The Court: As soon as he reached the hatch, the hold where they put the fish.

The Witness: ——I see one man with the head inside the hold, his feet on deck with the bell on top, and I help myself go to bring down the skiff.

The Court: You helped to pull the man you saw that way into the skiff. Where was the skiff?

The Witness: The skiff was on the water.

The Court: What part of the ship?

The Witness: On the stern.

The Court: On the stern. Okay, what happened?

The Witness: After that, when I put on the deck the boat go down. It was all fire, can't hold it, I hold myself on the rail to go on the stern, it was about two feet up and the bow was down.

The Court: The bow of the ship was down, I held onto the rail in order to go along. [241]

The Witness: Yes, I help myself on top to go on the skiff, too.

The Court: In order that I could go down to the stern of the ship and then get into the skiff.

The Witness: That is right.

(Testimony of Salvatore Romeo.)

The Court: From the stern. Did you have this man with you all the time?

The Witness: No, I can't hold him no more, otherwise I am dead myself. There was fire there, it was on the water, I have to hold myself to go there, you see, because the boat was like this. After that it make like that, you know, stand up.

The Court: The boat was, indicating at a——

The Witness: The bow, it go down.

The Court: The bow of the ship went down and indicating that the deck of the ship was at a sharp angle to the surface of the water.

The Witness: That's right.

The Court: And you had trouble then walking along the deck because of the angle and pitch.

The Witness: Can't walk on the deck, you have to hold yourself.

The Court: You couldn't walk on the deck. Who was this man that you pulled out of the hold, out of the hatch?

The Witness: I don't know what his [242] name is.

Mr. Vartan: I can help you——

The Witness: I don't know who——

Q. (By Mr. Vartan): Is that the man who died? A. Yes.

Mr. Vartan: That, your Honor is Jacques Cardinale, the decedent, in whose behalf suit is filed here. That's the boy from Algiers.

The Witness: Yes.

Q. (By Mr. Vartan): Jacques Cardinale?

(Testimony of Salvatore Romeo.)

A. Yes.

The Court: Go ahead, counsel.

Q. (By Mr. Vartan): Now, did you notice any fire on the gasoline dock?

A. I can't tell you that; the fire on the boat, I know that.

Q. When was the fire on the boat?

A. As soon as the boat go down, there was fire on top of the water, and I can't say that, I don't know how they come.

Q. Well, was the fire on the boat after you get off on the skiff, then you see the fire on the boat?

A. No, I was on the boat when—that's why I run.

Q. I see. Now, did you look at the dock to see if there was fire up there? [243]

A. No, I no look.

Q. You were busy?

A. I was busy to save myself. I jump in the water or overboard to the skiff, one of the two.

Q. Did you see Frank Cardinale after he take the hose, put the end of the hose in the——

A. On deck.

Q. On deck?

A. In the hole.

Q. And then after that did you stand there and watch him?

A. No, I no see him any more after that.

Q. You didn't see him any more after that.

Mr. Vartan: You may cross-examine.

(Testimony of Salvatore Romeo.)

Cross-Examination

By Mr. Nave:

Q. Mr. Romeo, how long had you been the fishing captain on the Santa Lucia before this explosion, how many years or how many months?

A. I think it was about five months, five or six months; I am not sure.

Q. Five or six months before this explosion?

A. Yes.

Q. Did you operate at any time the engines, did you run the ship?

A. No, I don't know nothing about the engines, I never go [244] down.

Q. Did you ever go down in the engine room? Did you ever see the big engines and the auxiliaries, electrical connections down inside the boat?

A. If I go down there, I still don't know anything about it.

Q. You were never down in the engine room at all? A. No.

Q. At any time. All right. Did you ever take gasoline aboard the ship yourself, did you ever handle the gasoline hose and fuel the gas tank?

A. No.

Q. At no time. Now, during the month this accident, this explosion happened, in September, 1954, did you at any time during that month of September before this explosion, do any repair work on the Santa Lucia? A. You mean on the boat?

(Testimony of Salvatore Romeo.)

Q. Yes. A. No.

Q. Did you ever do any painting?

A. No, no painting.

Q. Did you ever do anything with the electrical fixtures, electric wires, anything like that? Did no work on them? A. I don't know.

Q. Did you see the work done on it? [245]

A. No.

Q. By anybody? A. No.

Q. Now, during that month of September, the month of this explosion, were you out fishing from time to time in the ship? Did you go out fishing in September before this explosion?

A. We was, the boat was tied up, the bank, they want to take it off the boat. There was two guys there to watch the boat. I don't know what they do; they say they fix it, the engine.

The Court: When was that that you had the engine——

The Witness: I think it was a month before that.

The Court: The ship pulled up and put on land and scraped? Did you go in any yard and pull your ship out of the water at any time during the five months you worked aboard?

The Witness: I don't know, maybe the owner of the boat take care of that. I don't know.

The Court: Do you know whether it was done?

The Witness: No, I don't know.

The Court: Do you know whether they took the ship out of the water?

(Testimony of Salvatore Romeo.)

The Witness: No, I don't know.

The Court: Do you know how long the ship was laid up while these men were fixing the engine? Was your ship laid up while they fixed the engine? [246]

The Witness: No, they tie it up on the wharf.

The Court: How many days? How long?

The Witness: About two weeks or twenty days.

The Court: When was that?

The Witness: I don't know what months it was.

The Court: Was it in the summer time?

The Witness: That's the time we go anchovies. Anchovies.

The Court: Anchovy time? Or before anchovy time?

The Witness: Anchovy time.

The Court: So you didn't use the ship for two weeks during anchovy time?

The Witness: What?

The Court: You say your ship was tied up at the wharf?

The Witness: Yes.

The Court: While there was some repairs being done?

The Witness: No, no, no repairs; no repairs.

The Court: No repairs.

The Witness: No repairs, the bank want to take it away, the boat.

The Court: The bank wanted to take it away. Oh.

The Witness: It was tied up on the wharf, but no repair. [247]

(Testimony of Salvatore Romeo.)

The Court: The bank had a mortgage?

The Witness: That's right.

The Court: Oh, I get it. The bank put a watchman on it.

The Witness: That's right.

The Court: And the crew get him off?

The Witness: Everybody was off.

The Court: Everybody off, the bank on the ship?

The Witness: That's right.

Q. (By Mr. Nave): So you don't know of any repairs that were made on the fishing boat during the month of September, 1954; as far as you know, none were made?

A. No, I don't know. I don't know.

Q. Thank you. Now, as you came into the—strike that.

Are you familiar with the galley where the cook stove is? Have you been in the galley where they fixed the meals, haven't you?

A. In the kitchen, you mean?

Q. Yes. A. Yes.

Q. Were you in there at any time the day of this explosion?

The Witness: You mean what day what?

Q. The same day the boat blew up, were you in the kitchen at any time that day? [248]

A. Yes.

Q. When were you first in there? Were you there that morning early?

A. Yes, it was in the morning, and noon time. We get coffee.

(Testimony of Salvatore Romeo.)

The Court: Were you going to eat your supper on ship?

The Witness: Yes.

The Court: What time do you get supper, Captain?

The Witness: You mean noon time?

The Court: No, night.

The Witness: Night. We haven't got to cook it, it is all ready to eat, but we wait to get away from the wharf.

The Court: What time do you eat at night?

The Witness: Depend, 5:00 o'clock, 6:00 o'clock, 7:00 o'clock, it depend on what time we go to work.

The Court: The cook was all ready——

The Witness: He got everything ready.

The Court: How do you know? How do you know he had everything ready?

The Witness: He say so, they have steak, we have the steak all ready and on the table, but never cooked yet, but we wait, everybody want a table.

The Court: Go ahead, counsel. [249]

Q. (By Mr. Nave): Are you familiar with the stove that was in the kitchen?

A. What do you mean?

Q. You know there was a stove in the kitchen?

A. Oh, yes.

Q. That was where the coffee was made?

A. Sure, on a fishing boat the coffee is there all the time.

Q. Coffee all the time?

A. All the time.

(Testimony of Salvatore Romeo.)

Q. Hot coffee on the stove all the time, didn't they?

A. That's right.

Q. That coffee is heated on an open flame, a burner?

A. No, no, it's on top like that, you see, oil stove, you know.

Q. Oil.

A. You put on top here, any time the fishing men get in the kitchen and get a coffee.

The Court: Is it a kerosene oil stove?

The Witness: Oil.

The Court: Kerosene?

The Witness: Yes.

The Court: Have you got a kerosene tank aboard the ship?

The Witness: Same oil the engine burns.

The Court: The same oil the engine burns runs the [250] stove?

The Witness: That is right.

The Court: That's Diesel?

The Witness: Yes.

The Court: Have you got a tank for the Diesel oil?

The Witness: Two tanks.

The Court: Two tanks. Where are those tanks located?

The Witness: Each side of the engine room; one this side and one this side.

The Court: How big, how many gallons?

The Witness: I don't know, I can't tell you that.

(Testimony of Salvatore Romeo.)

The Court: Are the tanks connected with the pipe, do you know?

The Witness: Naturally it be connected with a pipe. How in the world they going——

The Court: Both tanks connected with a pipe from one tank with the other tank?

The Witness: One each side.

The Court: In a relay, yes.

The Witness: Sure.

The Court: Okay. Go ahead.

Q. (By Mr. Nave): Do you know how the Diesel oil went into the stove, how [251] it was connected to a tank?

A. I don't know that, I no engine man, I don't know anything about him.

Q. You don't know anything about it.

The Court: Who was the engineer on the ship?

The Witness: Frank Cardinale.

The Court: That is the man that is dead, is he?

The Witness: Yes, he was the owner, engineer, everything. He take care of everything; I take care of the net.

The Court: Who helped Frank with the engine? Who helped Frank on the engine?

The Witness: He alone.

The Court: He all alone?

The Witness: Yes.

The Court: Do you know where the engine that was run with the gasoline was located? You were taking on 30 gallons of gasoline?

The Witness: Yes.

(Testimony of Salvatore Romeo.)

The Court: What did you use the gasoline on the ship for?

The Witness: For the pump to wash the boat.

The Court: For the pump to wash the boat. How was your winch run, steam or engine?

The Witness: Engine, big engine. [252]

The Court: Gasoline?

The Witness: No, no, oil.

The Court: Oil. So the only thing that is run with the gasoline——

The Witness: Just the pump, when you need the pump.

The Court: Now, where is that pump? Where is the pump engine?

The Witness: The pump engine in the engine room.

The Court: How far away from the gasoline tank was the pump engine located?

The Witness: I don't know. I never see.

The Court: Do you know where the gasoline tank was?

The Witness: I think inside the engine room, but I don't know.

The Court: You don't know. Okay.

Q. (By Mr. Nave): Now, Mr. Romeo——

The Court: May I inquire whether there is a sketch or plan of this ship. There is none that shows the layout of this stuff? All right.

Mr. Vartan: Not so far as the Libelants are concerned. It is up to them.

(Testimony of Salvatore Romeo.)

The Court: I mean, you have no——

Mr. Vartan: No.

The Court: You haven't seen it. If you have one, [253] you'd better get it in evidence.

Mr. Silvers: It is available and the Libelants have seen it.

The Court: All right.

Mr. Vartan: Wait awhile. The Judge asked——

The Court: If there is a sketch of this ship that shows the layout of this equipment, it might be advisable for somebody, if they want to, to put it in evidence at an early date. I am not directing that be instituted, simply a suggestion which counsel can take or reject as they see fit. Go ahead.

Mr. Nave: Thank you, your Honor.

Q. (By Mr. Nave): Now, when the Santa Lucia came into the wharf to get gasoline, where were you standing at that time? Were you up in the bridge, pilot house? A. On the wheel, yes.

Q. On the wheel.

A. I was on the wheel and Frank was at the control.

Q. You were steering the ship?

A. I was at the wheel, yes.

Q. And Frank was standing there——

A. Alongside of me. The wheel is over here and the control is right here (indicating).

Q. And you heard Frank say something to the man on the service station dock? [254]

A. "Thirty gallons of gas."

Q. He said thirty gallons? A. Yes.

(Testimony of Salvatore Romeo.)

Q. That's all you heard? A. Yes.

Q. You went down on the deck? A. Yes.

Q. And you saw Frank getting the gasoline hose? A. Yes.

Q. You saw him put it in the fuel hole on the deck? A. Yes.

Q. And then you heard another conversation later in which the man up on the dock said, "You got fifty-eight and a half gallons of gas"?

A. Yes.

Q. Is that right? And what was it that Frank said?

A. He swear, "Jesus Christ, where the gas go."

Q. Where did the gas go?

A. And I turned around and I said—I don't see nobody, I just heard the voice.

The Court: He just heard the voice, he didn't see nobody.

The Witness: Because we, of course, work with the fishermen, he take care of all of it, all of that. It was inside the engine room. I don't see nobody, the voice, they [255] holler. After that, boom, no more boat.

Q. After you heard Frank say, "Where did the gas go?" did you see what Frank did then, Frank Cardinale? Did you see what he did? A. No.

Q. Did you see him go over on the other side of the fish boat?

A. I don't see, I no see nothing at all, I just heard the voice, that is all I see.

Q. Now, how long after you heard Frank say,

(Testimony of Salvatore Romeo.)

“Where did the gas go?” was the boom-boom?

A. After two or three minutes.

Q. Two or three minutes?

A. Maybe five minutes, I don't know, I can't judge myself the time.

Q. You hear the boom-boom, like you said, and the ship blew up, the boat blew up, is that right?

A. Yes.

Q. And the whole part of the hull came down on top of you? A. Whole power house.

Q. The whole what, sir?

A. Powerhouse.

Q. The powerhouse, the pilot house?

A. We say the house.

Q. That was right after the boom-boom the pilot house came [256] down on top of you, is that right?

A. (Witness nodding.)

Q. You said, I believe, a door saved you?

A. Yes.

Q. Will you tell me, please, what door it was that saved you and how it fell on you; what door was it?

A. The toilet door. See, like this, the toilet, and this is the kitchen (indicating).

The Court: Indicating——

The Witness: I was like this (indicating).

The Court: He puts his back to the wall and he says in back of him is the toilet door and to his left is the door to the kitchen.

The Witness: I face this way (indicating).

Q. (By Mr. Nave): If I understand you are

(Testimony of Salvatore Romeo.)

referring to the photograph, Respondent's Exhibit A, Cardinale, of the picture of the fishing boat?

A. Yes.

Q. You are speaking of the door that is on the fantail that goes into the galley?

A. It's two doors.

Q. Two doors?

A. Yes, one to the kitchen, one to the bathroom.

Q. And the one in back is the one you are talking about? [257]

The Court: The bathroom, the toilet. That was a toilet door?

The Witness: Yes, sir, he saved me, stay on top of me, otherwise I no here no more.

The Court: You say the deckhouse came down?

The Witness: That's right.

The Court: Just tell me what happened to that deckhouse. Did it fall to pieces?

The Witness: All to pieces, all come down. Nothing.

The Court: It wasn't pushed off altogether, was it?

The Witness: It was completely—break all to pieces.

The Court: The deckhouse was all broken to pieces?

The Witness: Yes. That's why the cook can't get out, I had to help him to get out, otherwise he would be dead.

Q. (By Mr. Nave): Then you helped the cook out of the cook house?

(Testimony of Salvatore Romeo.)

A. Otherwise he can't get out.

Q. All right.

Then at that time the fishing boat was sinking, going down? A. Yes.

Q. You saw the fire on the boat, then, didn't you?

A. Yes.

Q. Then you went on the skiff, is that [258] right? A. Yes.

Q. And you saw a fire on the water there?

A. (Witness nodding.)

Q. You stated, I believe, you couldn't walk on the deck?

A. No, I have to hold myself, otherwise I can't go.

Mr. Nave: I believe that is all. Thank you very much.

Mr. Silvers: No questions.

The Court: You have no direct? He has no questions.

Mr. Vartan: No, your Honor.

(Witness excused.)

Mr. Vartan: The diagram of the vessel, the Libelants, of course, didn't have that blueprint of the vessel. I understand the Respondents Cardinale have a witness who surveyed the boat who made a diagram, but in view of our theory of this, we don't think we should call their witness.

The Court: You don't have to call any witnesses you don't want to and you don't have to introduce

any exhibit in evidence, if you don't wish to. You try your own case your own way.

Mr. Vartan: Mr. Belleci, please.

The Court: That also applies to the other Proc-tors in the suit. [259]

ANTOINE BELLECI

called as a witness on his own behalf was duly sworn through the Interpreter to tell the truth, the whole truth and nothing but the truth, testified as follows through the Interpreter unless otherwise noted:

(Whereupon, Paul De Martini was sworn to act as Official Interpreter for the above witness and to translate from the English language into the language of the witness and from the language of the witness into the English language.)

The Clerk: Please state your name to the Court.

A. Antoine Belleci.

Direct Examination

By Mr. Vartan:

Q. Mr. Belleci, you are the Administrator of the Estate of Jacques Cardinale? A. Yes.

Q. Jacques Cardinale who lost his life in this occurrence was related to you?

A. He is married to my wife's sister.

Mr. Vartan: At this time, your Honor, we would——

The Court: Any dispute about this man being duly appointed and qualified?

(Testimony of Antoine Belleci.)

Mr. Silvers: No, your Honor.

The Court: Authorized to act as the Administrator of the Estate of Jacques Cardinale? [260]

Mr. Silvers: No, sir.

The Court: Very well.

Mr. Vartan: I take it we won't need to introduce the certified copy of the Letter.

The Court: Not with this concession.

Mr. Vartan: Very well. I have shown counsel, for the record, a statement from the Mission Mortuary——

The Court: Funeral bill?

Mr. Vartan: Funeral bill, Monterey, California.

Q. (By Mr. Vartan): I ask you, Mr. Belleci, to look at that and state whether or not the items on that bill were incurred in the preparation of the body of Jacques Cardinale for the funeral in Monterey, and also for sending the body back to Algiers?

A. Yes, I paid this bill, \$1,148.23.

The Court: \$1,148.23. Is it conceded that that is a reasonable charge for the services rendered?

Mr. Silvers: Yes, your Honor.

Mr. Nave: Yes, your Honor.

The Court: A seaman is entitled to be returned to his home town.

The Witness: And there is an item here at the bottom of \$769.00 that is still due.

Q. (By Mr. Vartan): In addition to the amount that was mentioned? [261]

A. Yes, in the amount of \$769.00, is still due.

(Testimony of Antoine Belleci.)

Mr. Vartan: I think there is an explanation there on the bill, your Honor.

The Court: \$1,148.00 apparently did not include the steel sealed casket and the outside shipping box, for which an additional charge of \$769.00 was made, but not yet paid. That would be a total, then, of \$1,917.23; preparation of body, funeral services and shipping back.

Is it conceded by both sides that is a reasonable charge for the services rendered?

Mr. Silvers: Yes, your Honor.

Mr. Nave: Yes, your Honor.

Mr. Vartan: We offer that, then, as Libelant's Exhibit next in order, your Honor.

The Clerk: That will be Libelant's Exhibit 5 introduced and filed into evidence.

(Whereupon, the foregoing bill for funeral of Jacques Cardinale was marked Libelant's Exhibit No. 5 and received in evidence.)

Q. (By Mr. Vartan): Now, Mr. Belleci, how old are you?

A. 53. I will be 54 years old on the 26th of September.

(The Court and the witness speaking in Italian.)

Q. (By Mr. Vartan): How many years have you lived in Monterey? [262]

A. I went down there the first time in 1928.

Q. How long did you stay at that time?

(Testimony of Antoine Belleci.)

A. Three years.

Q. And then you returned the second time?

A. Yes. I returned down there, I think—I didn't return down there in 1941 because the war had broke out, but I went down there in 1946 or 1951, and I returned down there in 1948 and then I went away and I went back there in '52.

Q. I see. Now, what has been your business or occupation during your lifetime, Mr. Belleci?

A. I have always been a fisherman.

Q. On September 28, 1954, were you employed on the Santa Lucia? A. I was the cook.

Q. I see. How long had you been on the Santa Lucia?

A. Since 1948. When I went back to France and returned, they always had the place open for me.

Q. Now, calling your attention to when the Santa Lucia tied up at the gas dock, did you see Frank Cardinale after the ship was tied up? A. No.

Q. Did you, while the ship was tied up there, and before anything unusual took place, observe a man on the gasoline dock?

A. No, I was in the kitchen doing my work.

Q. All right. [263]

Tell the Judge what you were doing in the kitchen during the time, well, before we ask you that—strike that.

Do you know about how many minutes took place or elapsed from the time the Santa Lucia tied up at the gas dock and until an explosion took place?

A. I had prepared the dining table, or had set it,

(Testimony of Antoine Belleci.)

and then I had made some French fries and then I had finished making the French fries and then I had breaded the meat. We were still alongside the wharf at that time.

Q. Let me ask you—were you through, Mr. De-Martini?

The Interpreter: Sir?

Mr. Vartan: Were you through?

The Interpreter: No, he isn't through yet.

A. (Continuing): When I got through breading the meat, we were still alongside the wharf. And I turned around and I went to work and finished setting the table, plates and knives and forks, and so forth, and I turned around to the buffet to get the pepper and salt shaker, and as I reached up there to get it, I heard the explosion.

The Court: Did he say he was making frigadella (sic)?

The Witness: Frigadella?

The Court: Chopped meat.

The Witness: Frigadella is liver, isn't it? These were steaks, breaded steaks.

Q. (By Mr. Vartan): [264] Now, you mentioned you had finished the French fries. When had you cooked the French fries?

A. Oh, I had finished cooking them about 25 minutes or a half hour.

Q. Before? A. Yes.

Q. Before what?

A. Before going to the wharf.

Q. I see.

(Testimony of Antoine Belleci.)

A. Because the ship was traveling along slowly because they were washing down decks.

Q. Mr. Belleci, will you explain what type of a stove you had in that galley?

A. A stove like on all vessels. The top of it was a solid plate with the exception of a small hole where you lit the stove.

Q. There were not, then, any separate burners like you see in a kitchen stove?

A. No, no, no.

Q. Now, this plate, this metal plate, will you please tell us how large that was? First, the width and then the length.

A. It was about as long as my both outstretched arms.

The Court: About five feet by about two and a half to three feet in width. [265]

The Witness: And about two feet, indicating about two feet wide.

Q. (By Mr. Vartan): Mr. Belleci, how was that—strike that. When you want to cook anything would you put it on that plate? A. Yes.

Q. All right. Now, was there any burner or burners under that plate?

A. If I wanted to increase the heat under that plate, why, I would turn a valve up a little bit and the flames would spread out all over underneath that.

Q. All right. What I was interested in now is, was there one valve, one burner?

A. There is only one.

(Testimony of Antoine Belleci.)

Q. I see. When you came into the gasoline dock, was that plate, that stove that you had there, hot or cold? A. It was absolutely cold.

Q. When the top plate of this stove was cold, was there any flame underneath it? In other words, did you have a pilot light? A. A small pilot light.

Q. Have him show. Indicating about a half an inch high. Was that pilot light ever turned off on the Santa Lucia? A. No, that was always lit.

Q. Day and night? [266]

A. Yes. It worked very well.

Q. Had you worked on other vessels besides the Santa Lucia, other fishing vessels?

A. Yes. In 1956 I worked—'55 or '56, for the Pacific Star.

Q. Was this after this explosion or before?

A. (In English): Yes.

(Through the Interpreter): Yes, it was after the explosion. I was ill for a while and then I went to work on that vessel.

Q. Now, did you work on fishing vessels before you worked on the Santa Lucia?

A. Yes, I worked on board other vessels.

Q. Did you work on these other vessels before the Santa Lucia as a cook?

A. Oh, once in a while, a year, for instance, I would work as a cook, because there was too much work, and then probably two years I worked as a fisherman.

Q. Now, this stove that was in the Santa Lucia.

(Testimony of Antoine Belleci.)

was that built any different from any stove you had seen on fishing vessels?

A. No, the same as the other boats.

Q. And when you were a cook on the other vessels, was the pilot light left on day and night?

Mr. Nave: I object to that, if the Court [267] please. That is not material in this case.

The Court: Sustained. Was there a pilot on this stove on the Santa Lucia?

A. Yes, a very small pilot light.

The Court: What supplied the fuel for the pilot light?

A. The same oil that ran the engine.

Q. (By Mr. Vartan): Will you describe the burner on this stove? Tell us what it was like. Was it a torch burner, projected a flame under pressure, or was it a burner in which the oil came out in little holes?

A. No, it come very gradual. If I turned it on, just like up a little more, and if I turned it down a little bit, it would reduce the flame.

The Court: So that if you wanted to turn the stove on and get the flame, you would open up a little valve that would let the oil flow through?

A. Yes.

The Court: And the oil that came through when you opened the valve was ignited by the pilot light, is that right?

A. The oil came piped up from below and came and was lit by the pilot light and if I wanted to increase the flame under the plate, why, I would turn it up or down.

(Testimony of Antoine Belleci.)

The Court: Did he say little by little? [268]

The Interpreter: Yes.

The Court: Little by little. And when you wanted to turn the stove off, you shut the oil off by turning the valve back?

The Witness: Yes.

The Court: Now, that turned off the big flame, but that did not interfere with the pilot light?

The Witness: No, it would shut off the flame that would come up under the plate and that little pilot light would just keep a little heat under the stove at all times.

The Court: Was that pilot light on all the time while you were out on the ship, or did you have a valve by which you could turn the pilot light off?

The Witness: Of course, when we were working, it was always lit, but if we were ashore for two or three days, then I would turn the valve off and shut that pilot light off.

The Court: Now, was this pilot light on during all the time after you made these French fried potatoes and while you were waiting until it was time to cook the steak?

The Witness: Yes.

The Court: How big was that pilot light? Can you show me with your fingers about how big a flame it was?

The Witness (Indicating): This way.

The Court: Indicating about a quarter of an inch. And did it come out through a little [269] spout?

(Testimony of Antoine Belleci.)

The Witness: Yes, a small hole, and as I would open it up, the flame would raise a little higher.

Q. Now, so that to turn on the stove, you would raise and open up the pilot light and make a bigger flame on the pilot light?

A. When I would open up the pilot light to light the burner to heat the plate (and the witness indicates about one and a half inches high). That inch and a half flame would only come out one little hole in the pilot light and that would light a flame that remained in there and would light all under the plate.

The Court: Do you know the type of stove you had in this galley, or in the kitchen, what make it was, the manufacturer?

The Witness: I don't know, something was written there, Flegg, I can't tell you that, but the company knows what it is.

The Court: Okay.

Q. (By Mr. Vartan): The stove had a brand on it, did it not, showing that it had been manufactured by some company? A. Yes.

The Court: He said it did, but he didn't remember the name.

Mr. Vartan: Oh, I am sorry. [270]

The Court: He thought it was Flag something, but he wasn't sure.

Mr. Vartan: All right.

Q. (By Mr. Vartan): Still on the subject of this stove, did Frank Cardinale—who was your boss on that vessel?

A. I knew the boss as Frank Cardinale.

(Testimony of Antoine Belleci.)

Q. Now, when you went into this wharf or gas dock to take on gas, did Frank Cardinale tell you to turn off the pilot light under the stove?

A. No, nothing.

The Court: Where was the hole where they put the gasoline hose on the deck?

The Witness: I don't know. I was in the kitchen working.

The Court: Don't you know where the hole to the gasoline tank was?

The Witness: I don't know, it was on the port side of the vessel, but I don't know, they were working around there, I don't know whether it was up towards the bow or to the stern, because there are the connections there for the oil, there is the gasoline connections. I don't know.

Mr. Vartan: Before I get into the medical phase, may we have the customary recess?

The Court: Sure. How long do you want? [271]

Mr. Vartan: Ten minutes.

The Court: You tell me when.

(Short recess.)

Q. (By Mr. Vartan): Will you please tell us what was the menu for dinner that night?

A. T-bone steak.

Q. Anything else?

A. Salad and French fries.

Q. Now, you have already told us you were not cooking the French fries when the boat was at the gas dock?

A. Yes.

(Testimony of Antoine Belleci.)

Q. Did you have the steaks out of the refrigerator?

A. I had already breaded the beeksteaks and placed them in a tray and set them on the wash stand or sink.

Q. Had you been given any instructions as to any particular time when dinner should be ready that night?

A. Yes, they had to wash up and clean the oil and dirt off of themselves, because they probably clean fish, one thing and another. I have orders to prepare the dinner for six or half-past six, around about that hour.

Q. Now, what injuries did you sustain in the explosion?

A. I had an injury to the left side of my head above the left ear. I had my right arm—my right arm was swollen (witness indicating around the region of the elbow), and I had my [272] ribs and my back were injured.

The Court: Did you go to the hospital?

The Witness (In English): Yes.

Mr. Vartan: I was just showing counsel the records, which probably will shorten this.

The Court: While he is looking at that, let me ask you a question:

What were your wages on the ship?

The Witness: We worked on shares.

The Court: Go ahead.

Q. (By Mr. Vartan): How much per month during the anchovy fishing season were you making?

(Testimony of Antoine Belleci.)

A. In four or five months, depending upon the catch, would make \$2,500.00, \$3,000.00.

Q. That's in how many months?

A. Four or five months.

Q. Where was this crew, where was the Santa Lucia going from Avila after this day?

A. The next day the cannery wanted more anchovies and we were to go out the next day.

Q. When did the sardine season start?

A. The first of October.

Q. That would be just a few days later?

A. Yes. [273]

Q. And it was the same crew on the Santa Lucia that was going to go sardine fishing?

A. The same crew.

Q. And how many months would the sardine fishing last, then?

Mr. Nave: Object to that, because that is speculative, conjectural.

The Court: Overruled. I will take it. I don't know whether it is going to be material or not.

The Witness: From the first of October until the latter part of February or first of March. Anyway, it would last up to the month of March.

Mr. Vartan: At this time, your Honor, I would like the record to show that I have shown both counsel the photostatic records of the French Hospital, covering Mr. Belleci, and also a statement of Frank P. Cazenza, M.D., Monterey, California; also a statement from two doctors at the San Luis Clinic, and

(Testimony of Antoine Belleci.)

we offer them at this time as Libelant's Exhibit next in order.

The Clerk: Libelant's Exhibit 6 introduced and filed into evidence.

The Court: Any objection?

Mr. Nave: I have no objection.

Mr. Silvers: No objection.

The Court: Then by consent—and do we have the [274] stipulation that the bill charged here of \$165.50 is a reasonable bill?

Mr. Nave: I will so stipulate, your Honor.

Mr. Silvers: Yes.

The Court: You go ahead, counsel.

(The records of the French Hospital for Mr. Antoine Belleci and statement of F. P. Cazenza, M.D., were marked Libelant's Exhibit No. 6 and received in evidence.)

Mr. Vartan: All right.

Q. (By Mr. Vartan): Now, how long were you in the French Hospital, Mr. Belleci?

A. I don't know, I think about four or five days.

Q. From there where did you go?

A. Monterey.

Q. Was that your home? A. Yes.

Q. When you got home, what did you do?

A. I remained there, my sister came down and she took me to the doctor's.

Q. I see. Were you in bed during the days when you first returned to your home?

(Testimony of Antoine Belleci.)

A. Yes, I remained abed, because I couldn't walk.

Q. What bothered you when you walked?

A. My back here was all black and blue (and the witness [275] indicates the small of the back).

Q. You mentioned that your sister took you to a doctor; in Monterey, I assume?

A. Yes, with the automobile.

Q. Who was that, was that Doctor Frank P. Cazenza?

A. Yes.

Q. And the times that you saw the doctor are set forth on the statement that he sent you, is that right?

A. Yes.

Mr. Vartan: We can cut it short, your Honor.

The Court: When did you go back to work?

The Witness: I think I returned to work some five or six months after the——

The Court: Well, when, what date?

The Witness: I can't remember right now.

The Court: He can't remember it. He isn't making a good impression on me, counsel. He ought to know when he went back to work and how long he claims——

Mr. Vartan: Well, he told us, your Honor.

The Court: Refresh his recollection, if you want. Who did you go back to work for?

The Witness: I went back to work on Pacific Star.

The Court: When?

The Witness: I think it was the 15th of September.

(Testimony of Antoine Belleci.)

Q. (By Mr. Vartan): [276] What year?

A. I think September 15, '56.

Q. The accident, Mr. Belleci, happened in 1954.

A. Then I made a mistake. It is September 15 of 1955.

The Court: The record introduced in evidence shows Doctor Cazenza discharged him as cured on May 18, 1955, and Doctor Cazenza's bill shows no visits in February, only one visit in January, and four visits in April, four visits in May, no visits, February, March and April of 1955.

Look at that.

Mr. Vartan: Yes, I have seen it, your Honor.

The Court: When did you go back to work, when did you go back on a fishing trip?

The Witness (In English): 15 September, 1955.

Mr. Vartan: I think we can clear that up, your Honor. The seasons aren't always all year around, you see.

The Court: Yes, but he says that the season is up to the first of March, sardine season.

The Witness: No.

The Court: Just testified to that.

Mr. Vartan: No, we can explain that, your Honor, I am sure.

Q. (By Mr. Vartan): You explain why you didn't go back to work until September, and also explain if you don't start on a vessel at [277] a particular time, then you are not on a crew.

A. For a month or two there wasn't anything to do there at Monterey.

(Testimony of Antoine Belleci.)

Q. That's your answer.

A. And I signed aboard the Pacific Star to go to San Pedro.

The Court: Did you make income tax return, did you pay income taxes?

The Witness (In English): Yes.

The Court: You got a copy of the income tax?

The Witness (In English): No, I got it home.

Mr. Vartan: We will have it here, your Honor.

Q. (By Mr. Vartan): Now, did you wear any brace or corset on your back?

A. Yes, the doctor gave me one.

Q. How long did you wear that?

A. Two or three months.

Q. Did you wear that day and night, or only when you walked about?

A. No, I wore that corset when I was up and around. When I would go to bed, I take it off.

Q. Do you have any difficulty at all at the present time with your back?

A. When there is bad weather, then I have trouble with my back.

Q. Will you please point to the area? [278]

A. (Indicating): Indicating from the small of the back on the spinal column and up through the back of the head and base of the skull.

Q. Did Doctor Cazenza advise any particular care that you could give to yourself, to your back, after he discharged you?

A. He told me to take it easy and he said this is an affliction that will take some time to get rid of.

(Testimony of Antoine Belleci.)

Q. When you first went back to work for the Pacific Star, what type of work did you do?

A. Same, cook.

The Court: Are you working steady now, are you?

The Witness (In English): I work steady some time.

The Court: You feel well, do you?

The Witness (In English): Oh, yes.

(Through the Interpreter): Yes, I work pretty steady, but I must tell you that once in a while I am bothered, not so very heavily, but it bothers me sometimes when the weather changes.

Mr. Vartan: I have no further questions.

Cross-Examination

By Mr. Nave:

Q. Mr. Belleci, do you know whether or not there was any fuel tank in the kitchen?

A. There wasn't any.

Q. There was a small pipe then, from the stove that went [279] down into the engine room, is that where the fuel came from?

A. But the oil comes from above, the pipe, passes overhead.

Q. Then there is a fuel line that comes from the engine room up to the ceiling of the kitchen, is that correct?

A. Yes, the oil comes, the pipe comes up from below and goes up under the ceiling and then down to the stove, comes up under the stove.

(Testimony of Antoine Belleci.)

Q. Do you know how large that pipe was?

A. About the size of a spaghetti.

(The Court and witness speaking in Italian.)

The Witness: The large size of spaghetti.

Q. (By Mr. Nave): Can you tell me a quarter of an inch or a half inch?

The Court: About three-sixteenths of an inch, about.

The Witness: He said smaller than the handle of this little apparatus here, about one-eighth of an inch.

Q. (By Mr. Nave): Now, did you have any pump that made pressure to get the fuel oil up from below?

A. No, it came by itself.

Q. You don't know where the pressure came from that brought it up?

A. The boss, I guess, put it under pressure down below and that would bring the oil up.

Q. Now, you had hot coffee in the galley, didn't you? [280]

A. Yes, right on the corner of the stove.

Q. You kept a coffee pot on this burner, kept it hot, isn't that right?

A. Kept it on an apparatus there that would just keep the coffee warm, not hot.

Q. That was on the burner that had the flame?

Mr. Vartan: Mr. Belleci—excuse me, Mr. Nave. Will you ask the witness to wait until——

The Witness (Interrupting): It was on the corner of that plate on the stove.

(Testimony of Antoine Belleci.)

Q. (By Mr. Nave): Perhaps I didn't understand it. What I want to find out is what kept the coffee hot, where did the heat come from that kept the coffee hot?

A. Well, if the plate is warm and we have the coffee over this pilot light, it get too hot, we move it over on the the corner where it keeps a moderate heat, otherwise the coffee would become too black and too strong and you won't be able to drink it.

Q. But the coffee is heated on this burner, this pilot light burner you talk about?

A. Right close to it. Yes, right close to that pilot light, because if the plate is hot, it wouldn't make any difference where you put, because if the plate is hot, it wouldn't make any difference where you put it around there, you make the coffee. [281]

Q. All right. Now, did anyone come in the galley while the fishing boat was at the dock and before the explosion?

A. I didn't see anyone come there, but I think one of the seamen came in and took two or three French fries and went out, but I didn't see him go out. One of the fishermen.

Q. Was that Frank Pedrasaz?

A. Yes, the Frenchman.

Q. He came into the galley and snatched some French fries?

A. (In English): That's right, yes.

Q. Did you say anything to him?

A. I didn't see him.

(Testimony of Antoine Belleci.)

The Court: Were you operated on at any time for hernia? Ask him in Italian.

The Witness: No.

The Court: You got an operation——

The Witness (In English): Appendicitis, operation for appendicitis.

The Court: How long ago?

The Witness (In English): Oh, 1935, 1936.

The Court: Have you got a cut on both sides in here, two cuts? (Indicating.)

The Witness: Only one incision.

The Court: The hospital record shows healed scars right and left abdomen.

Mr. Vartan: I don't know. [282]

The Court: This is the hospital examination that is in evidence now.

Mr. Vartan: We are perfectly willing to have the man pull up his shirt, your Honor.

The Court: I am not a doctor.

Mr. Nave: Well, if they have scars——

The Court: Here is the record that says healed scars, left and right abdomen.

The Witness: I have a scar on my left side that came from a graft, that I had an injury to my finger, my right hand, and they took the skin off my abdomen on the left side here and put it onto the finger.

The Court: Were you ever in any other accident besides this?

The Witness (In English): No.

(Testimony of Antoine Belleci.)

The Court: How about the hand? What happened when you hurt your hand?

The Witness: I got it caught in the cable that was on the winch.

Mr. Nave: Shall I continue, your Honor?

The Court: Yes.

Q. (By Mr. Nave): Now, when this explosion took place, what happened, what actually happened when you felt the explosion?

A. I felt the blow and I was on the floor and I tried to [283] get up and I couldn't get up.

Q. Did the cabin blow up?

A. The buffet was there intact and the stove was intact, but I couldn't get up, and the superstructure over the galley, that all came down on me.

Q. Now, you heard one boom, one explosion?

A. I heard one boom.

Q. And then the superstructure fell on you, is that right?

A. Yes. I looked around to see what was around there and the stove was all intact and everything, but all this superstructure was on me.

Q. And did the door into the crew's quarters blow in on you?

A. Yes, struck me in the back and knocked me forward toward the radio.

Q. And you were knocked out, rendered unconscious?

A. Some ten or fifteen minutes, and then I tried to arise, and I couldn't.

Q. Did you see any fire any place before the ex-

(Testimony of Antoine Belleci.)

plosion? A. Nothing at all.

The Court: How long were you at the hospital, how many days?

The Witness: Some five days.

The Court: Was it three days?

The Witness: It seems to me it was four or five days. [284]

The Court: The record shows he was discharged on October 1.

Q. (By Mr. Nave): Now, Mr. Belleci, you had stated, I believe, that you had worked on the Santa Lucia four or five months before this explosion, is that correct? A. Yes.

Q. And during those four or five months did you receive a check for your share each month?

A. I hadn't caught any fish during the four or five months.

Q. Did you receive any money during the four or five months that you were on the Santa Lucia before this explosion?

A. What we were going to get was little or nothing.

Mr. Nave: Thank you, that is all.

The Witness: We didn't get any fish.

Mr. Silvers: Your Honor, I have a photostat of a sketch which had been previously made of the boat in question, which I have shown to other counsel, which indicates that the location of the main deck structures, including the galley, crew's quarters and the gas tank fill pipe, which, for illustrative pur-

(Testimony of Antoine Belleci.)

poses, might be helpful, and I would like to offer that.

The Court: Any objection?

Mr. Nave: I have no objection with this understanding: that this photostat is a photostat of a drawing that was made [285] by Captain Hanson at the time his deposition was taken in connection with the other case, and if Captain Hanson was called as a witness for Cardinale——

The Court: Well, do you dispute this shows the relative location of these objects aboard the deck of the ship at the time of the explosion?

Mr. Nave: No, your Honor, I don't mean that.

Mr. Silvers: I am only offering it for that purpose.

Mr. Nave: I just want your Honor and the record to know who prepared it and under what circumstances.

The Court: Irrespective of who prepared it and under what circumstances it was prepared, do you have any objection to having the Court receive this as an exhibit to show the relative location of the various equipment and appurtenances of the ship, particularly of the deck, as they existed aboard the Santa Lucia on the day of the explosion, September 28, 1956?

Mr. Nave: I have no objection to it, your Honor.

The Court: No objection?

Mr. Vartan: No objection.

The Court: It will be received.

(Testimony of Antoine Belleci.)

Mr. Vartan: Reserving the right to cross-examine any witness as to——

The Court: Yes.

Mr. Vartan: ——the photostat at any subsequent time. [286]

The Court: Yes.

The Clerk: Respondent's Exhibit H, Cardinale's Exhibit H.

(The map above referred to was marked Respondent Cardinale's Exhibit H and received in evidence.)

Mr. Silvers: I might also point out to the Court that I don't think there will be any dispute on this point, that the length of the vessel was approximately 73 feet with a beam of about 21 feet.

The Court: Beam 21 feet; and length?

Mr. Silvers: About 73.

The Court: 73 feet.

Mr. Silvers: I think the exact figures are 72.8 and 20.5.

Cross-Examination

By Mr. Silvers:

Q. Mr. Belleci, how much below the level of the stove plate was this little pilot light that you have described for us?

A. (Through the Interpreter): The witness indicates about eight inches below the plate.

Mr. Vartan: I don't think he understood the question, your Honor.

(Testimony of Antoine Belleci.)

The Witness (Through the Interpreter): Indicates about a foot. [287]

Q. (By Mr. Silvers): And it is true, is it not, that it was the custom and practice on fishing vessels of this type that you had served on, to keep the pilot flame on while the ship was operating and at all times, other than when the crew was off the vessel completely?

Mr. Nave: I object to that question, if the Court please. It is not a question of whether this man had seen it on other vessels or not.

The Court: If you want to qualify him as an expert in good ship management and show that this was in accordance with good seamanship, you may do so, but he is thus far only qualified not in matters of maintenance, but in matters of a cook and fisherman.

Mr. Silvers: That is true, your Honor. I thought, however, that the custom and practice——

The Court: If he is qualified. He hasn't shown himself to have any experience in the management and operation of a ship. However, I will overrule the objection, but I am indicating to you that I am going to place very little weight on his testimony.

Mr. Nave: May I have a continuing objection to this line of testimony?

The Court: I don't like so-called continuing objections, I am going to take it, but I am going to consider [288] your objection as directed more to the weight to be given to this witness, but this being an admiralty suit, I will take it, but I will give it prac-

(Testimony of Antoine Belleci.)

tically no weight, give it no weight at all at the present time.

Mr. Silvers: I have in mind not his qualification as an expert on management, your Honor, but as a cook.

The Court: He may have been consistently careless in the operation of his stove, I don't know, he might have been extremely lucky and fortunate in his prior experiences, but you may have an answer to the question.

Will you read the question if you can locate it, Mr. Reporter?

(Record read by the reporter.)

A. The pilot light was kept lit at all times when the boat was in operation and when the crew went ashore and there was nothing to do aboard the ship, the pilot light was put out.

Mr. Nave: I move to strike the answer as not being responsive to the question.

The Court: I will take it. It is informative, anyway, on the issues. The motion denied.

Q. (By Mr. Silvers): Mr. Belleci, immediately after you felt the explosion, you told us that you fell to the deck, to the floor of the kitchen, is that correct?

A. Yes, right close to the [289] radio.

Q. Now, the bulkheads, the walls of the galley, the kitchen, were not blown up in the explosion, were they?

(Testimony of Antoine Belleci.)

A. No, because I tried to get up and everything seemed to be in order there.

Q. And from your position on the floor, you were able to see that the stove itself was still intact and had not been blown apart, isn't that correct?

A. Yes, I tried to get up and I couldn't. My brother-in-law came in and took me and put me in the skiff, Romeo, the owner of the skiff.

Q. The point I have in mind, Mr. Belleci, is that the stove, the kitchen stove, was still intact and had not been damaged after the explosion was heard and felt by you?

A. It was just like it was before the explosion.

Mr. Silvers: That's all.

Redirect Examination

By Mr. Vartan:

Q. Mr. Belleci, when you saw that the stove wasn't disturbed, was there any fire coming around, were there any flames around this stove area?

A. There wasn't any flame or fire around me, not at all.

Q. About how big an area was the galley area, how many feet wide and how many feet long was it?

A. A little wider than the jury box here and a little shorter in length. [290]

Mr. Vartan: For the record, counsel——

The Court: About 18——

Mr. Vartan: Indicating about 18 inches wider than the——

(Testimony of Antoine Belleci.)

The Court: Suppose you make it about eight by eighteen.

Mr. Silvers: I think that should be approximate.

The Court: All right.

Q. (By Mr. Vartan): Now, when you recovered your senses after the explosion, and you were in the galley, eight by eighteen, did you see any fire or flames any place in the galley?

A. Not in the kitchen near me.

The Court: All right. Thank you.

Are you coming back tomorrow? Are you going to bring the income tax?

Mr. Vartan: Yes, your Honor. We have had the same problem. He was supposed to. However, he has to stay here for the medical tomorrow; we hope to be able to call his family.

The Court: All right. Do you want to come inside a few minutes, please?

(Whereupon, an adjournment was taken until Thursday, September 5, 1957, at 10:00 o'clock a.m.) [291]

September 5, 1957—10:00 A.M.

The Clerk: Salmeri versus Cardinale and other consolidated cases, further trial.

The Court: I understand you gentlemen desire to place upon the record a stipulation.

Mr. Vartan: Yes, your Honor. In the matter of the actions involving the Libelant Nino Tarantino, the two actions on file, the record may show that a

stipulated decree may be entered for the payment of \$890.00 in full settlement of his two actions; and that the record may also show that the stipulated settlement is without prejudice to either Respondent on any remaining issues or cases.

Mr. Silvers: I think the record should show on that, your Honor, of that sum \$240.00 may be considered full settlement of the maintenance and cure claim of Libellant Nino Tarantino.

The Court: I have listened to the evidence in this case, I feel that this settlement is a just and fair settlement, \$240.00 payment, full payment of all claims arising from this incident with respect to maintenance and cure, and \$650.00 for the personal injuries.

I take it it is understood the settlement of this case, these suits by the Respondents is not to be deemed an [292] admission on their part of any liability, is not to be used against them for any purpose whatsoever in any of the litigation now pending before me or in any other suit.

Mr. Nave: Your Honor please, may the record also show that the Respondent Union Oil Company is paying \$325.00 of that.

The Court: Yes, and the balance of \$565.00 to be paid by the Cardinale Respondents.

Mr. Silvers: That's correct.

The Court: Submit a consent decree so providing so that I may sign it and have these libels dismissed without cost upon the record of the Court.

Mr. Vartan: Yes, your Honor.

The Court: All right, you may proceed.

Mr. Vartan: We will call Mr. Frank Pedrasaz.

Oh, excuse me. Your Honor, I notice there is a representative from the Marine Hospital with certain records. I hate to have her wait around. Will you please step forward?

The Court: It is customary in New York for the custodian of records just to turn them over to the Clerk.

Mr. Vartan: Very well.

The Court: What is the practice here?

The Clerk: Same way, your Honor. I will sign a receipt for her.

The Court: All right. [293]

Mr. Vartan: May it be stipulated, counsel, the records may be used and introduced in evidence?

Mr. Silvers: What records are these?

Mr. Vartan: These records covering the treatment and care of Frank Pedrasaz in the Marine Hospital in San Francisco.

Mr. Nave: I have no objection, except as to the records themselves, an opportunity to inspect them, if there is anything in them.

Mr. Silvers: We raise no question as to the foundation.

The Court: All right.

Mr. Vartan: We have an interpreter here.

The Clerk: Mr. Interpreter, will you please state your name for the record?

The Interpreter: Robert S. Silva.

(Whereupon, the Interpreter, Robert S. Silva, was sworn to act as the Official Court Interpreter.)

ter and to translate from the Spanish language into the English language and from the English language into the Spanish language during the testimony of the following witness.)

FRANCISCO PEDRASAZ LOPEZ

called as a witness, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as [294] follows through the Official Court Interpreter.

The Clerk: Will you please state your name to the Court?

The Witness: Francisco Pedrasaz Lopez.

Direct Examination

By Mr. Vartan:

Q. Frank, you are also known as Frank Pedrasaz, is that true? A. Yes.

Q. The name Lopez was your mother's name?
A. Yes.

Q. And the Spanish custom is you follow the mother's name also in your full name, is that right?

A. Yes.

Q. Frank, what is your age at the present time?

A. Thirty-six, thirty-seven.

Q. When is your birth date, please, and when will you be thirty-seven?

A. On the 20th of August.

Q. You were 37 the 20th of August, 1957?

A. No, 36 then.

Q. Oh, I see. Are you married, Frank?

A. Yes.

(Testimony of Francisco Pedrasaz Lopez.)

Q. How many children live at home with [295] you? A. Two.

Q. What is your wife's age? A. 38.

Q. Frank, do you speak a little English?

A. Yes.

Q. Now, on September 28th, 1954, were you a member of the crew of the Santa Lucia?

A. Yes.

Q. And how long had you been on the crew or in the crew of the Santa Lucia before it sank?

A. About three weeks to a month.

Q. And what were your duties?

A. I was one of the workers on board.

Q. Did you have anything to do with the engines?

A. Nothing.

Q. Did you do any repair work on the engines or any other equipment? A. No.

Q. Now, when the Santa Lucia came up to the Union Oil gas dock, where were you?

A. I was amidships.

Q. Did you notice where Frank Cardinale was?

A. He was above on the bridge.

Q. Did you assist in tying up the Santa Lucia to the gas dock? [296] A. Yes.

Q. After the vessel was tied up to the gas dock did you hear a conversation between Frank Cardinale and the Union Oil gas attendant?

A. They were talking. I didn't understand it all; the only thing I understood was that he requested thirty gallons of gasoline.

(Testimony of Francisco Pedrasaz Lopez.)

Q. Did you hear any answer to that request from the gas attendant?

A. No, I started to do my job and they continued speaking.

Q. Did you see a gas hose handed down from the gas dock? A. I did.

Q. To whom was that passed?

A. Frank Cardinale, not the one that died, his cousin is the one that got ahold of it.

Q. Chico? A. Chico.

Q. That's Francois Cardinale?

A. I just know him as Chico.

Q. And then when Chico got the hose what did he do with it? A. He passed it to Frank.

Q. Now, did you see what Frank did with the hose?

A. I saw that he went towards the front part of the ship with the hose. [297]

Q. Do you know of your own knowledge whether Frank Cardinale stayed with the gas hose after that?

A. I saw nothing else, because I started to go to work.

Q. Well, when you started to go to work what part of the ship did your work take you to?

A. I was amidships working on the sling and cleaning up the anchovies, washing the anchovies.

Q. Will you state what you were doing with the anchovies?

A. We were throwing them into the ocean.

(Testimony of Francisco Pedrasaz Lopez.)

Q. Was it necessary to cut their heads off, some of them?

A. Yes, we was scratching them with a coco, bringing them down.

Q. With a what?

A. It is a stick they call a coco.

Q. All right. Did you hear any subsequent conversation between Frank Cardinale and the gas attendant before the explosion?

A. No, because I started to work.

Q. Where were you when something unusual took place?

A. I was coming out of the galley, the galley door. I walked three steps, and then the explosion happened.

Q. What did you do in the galley?

A. It was rather late and I was hungry so I went in there and I picked some potatoes and I put them in my mouth.

Q. Do you know whether Mr. Belleci, the cook, saw you do [298] that?

A. I didn't see him, I don't know.

Q. Now, were the potatoes that he took, were they hot or were they cold?

A. They were already cold.

Q. Is the floor level of the galley or kitchen higher than the deck of the vessel?

A. Some three feet, more or less.

Q. Does he mean three feet or three steps?

A. The height of the deck of the kitchen is more or less three feet.

(Testimony of Francisco Pedrasaz Lopez.)

Q. Higher than the deck? A. Yes.

Q. And as I understand it you were stepping out of the galley when the explosion took place?

A. No. When I came out I saw the boy that works for the Union Oil Company with one of these gas extinguishers in his hand running, and then I came out of the kitchen and I stepped, I took three steps, and then the explosion took place.

Q. You took three steps after you saw the Union Oil man running with a fire extinguisher, is that right? A. Yes.

Q. And you saw the man on the dock with a fire extinguisher. Now, was this before or after the explosion? A. Before the explosion. [299]

Q. Will you describe for the Court the size of the—what you call the extinguisher?

A. Something like this, long and red, I saw. I didn't pay too much attention to it.

Q. Will you show the length again?

A. (Witness indicating.) More or less about that long.

Mr. Vartan: About two feet, counsel?

Mr. Silvers: I would say between two and three feet.

Mr. Vartan: All right. You can sit down.

Q. (By Mr. Vartan): What color was the object that he was carrying? A. Red.

Q. Now, after you saw him—strike that. You saw him running, is that correct?

A. Yes.

Q. Which direction was he running?

(Testimony of Francisco Pedrasaz Lopez.)

A. Toward the place where the gasoline hose was.

Q. I see. And then you took some steps, is that right?

A. I came out of the galley. I walked three steps, and then an explosion happened.

Q. When the explosion happened, how many noises did you hear? A. Two.

Q. Will you describe in your own way what you heard?

A. The first one wasn't too big; it just went boom, and [300] then the second one was a bigger boom.

Q. What happened to you then?

A. My arm was broken and so was the lower end of my foot here (indicating).

Q. Now, at the time of the two booms you were on your feet standing up, were you not?

A. Yes. I was down—I was throwing anchovies into the bay.

Q. I see. Now, after you heard the two booms were you knocked unconscious? A. No.

Q. Did you see any fire anyplace after the two booms?

A. Yes; the first thing I did was to look up and I saw that there was a fire on the pier.

Q. At that time did you observe any fire on the vessel, the Santa Lucia?

A. There was still no fire on there.

Q. Did you observe any fire at any time later on the Santa Lucia? A. Yes; I did.

(Testimony of Francisco Pedrasaz Lopez.)

Q. And will you please state when that was?

A. All of us were already in the skiff and we were pulling toward shore, and then we saw the fire on board the ship.

Q. After you heard the two booms did you feel anything falling on you? A. Yes. [301]

Q. Did you observe anything fall on you from the dock?

A. All I felt was that I had a broken arm and I had like fire scar or something.

Q. Do you know whether any material that was burning fell on you?

A. It was what broke my arm.

Q. Can you remember and tell us, if you can, what that object was that fell on your arm?

A. I do not remember too well.

Q. Well, was it metal or was it wood?

A. It was wood.

Q. And was it hot or burning?

A. It was.

Q. Do you know where that object came from that fell on your arm? A. No; I do not.

Q. Now, you mentioned that you were in the skiff later, everybody except the dead men were in the same skiff, were they?

A. We were all there except Frank and Frank Cardinale, the one that died.

Q. You mean except Jack?

A. Jack Cardinale.

Q. And Frank Cardinale? A. Yes. [302]

Mr. Vartan: At this time, your Honor, may the

(Testimony of Francisco Pedrasaz Lopez.)

record show that I am showing Mr. Nave certain hospital records and bills?

If there is no objection, your Honor, we offer these documents, being a bill from the San Luis Clinic for the doctor bill.

Mr. Silvers: No objection, your Honor.

Mr. Vartan: And also the hospital records.

Mr. Nave: What is the amount of that doctor bill?

Mr. Vartan: \$136.12. That's the French.

The Clerk: Libelant's Exhibit 7 introduced and filed into evidence.

(Whereupon, the foregoing hospital records and certain medical records and bills were introduced and filed into evidence as Libelant's Exhibit No. 7.)

The Court: It is conceded by all that the charges on these bills annexed to this Exhibit are reasonable in amount?

Mr. Silvers: Yes, your Honor.

Mr. Nave: I will so stipulate, your Honor.

Mr. Vartan: I also offer—you haven't seen these. You better look these over, the Marine Hospital records.

I also show counsel the X-rays purported to have been taken at the Marine Hospital. [303]

We offer at this time, your Honor, the records of the Marine Hospital covering this witness, and they are in two separate attached folders. I think you can attach them together or they can be separate.

(Testimony of Francisco Pedrasaz Lopez.)

The Clerk: Libelant's Exhibit 8 introduced and filed into evidence.

(Whereupon the foregoing records of the Marine Hospital were introduced and marked as Libelant's Exhibit No. 8 in evidence.)

Mr. Vartan: Also offer the X-rays from the same hospital.

(Whereupon the X-rays from the Marine Hospital were included in Libelant's Exhibit No. 8 in evidence.)

Q. (By Mr. Vartan): Now, Frank, where were you taken—well, I think I will get to the point—you were taken to the French Hospital in San Luis Obispo, is that correct? A. Yes.

Q. And from there you were in the Marine Hospital?

A. Afterwards I was brought to the Marine Hospital in San Francisco.

Q. Now, you were in and out of the Marine Hospital on several occasions, were you not?

A. Yes.

Q. You don't recall the exact dates you were in there, in [304] and out, do you?

A. I do not.

Q. Now, you have already told us you suffered an injury to your right wrist. What did that injury consist of generally?

A. It was broken in there and then afterwards

(Testimony of Francisco Pedrasaz Lopez.)

the doctor took a piece of bone out of here and put it here.

Q. Well, when you say out of here you are referring to your right hip bone, is that correct?

A. Yes,

Q. They took some bone from the right hip bone and put it in the wrist? A. Yes.

Q. Where was that done?

A. In the Marine Hospital.

Q. First let's direct your attention to the French Hospital in San Luis Obispo. Did you have an operation there?

A. Yes, I was operated on there.

Q. And was that within a day or the next day after you arrived there?

A. One day afterwards.

Q. Do you know what was done in that operation? A. I do not know, I was asleep.

Q. All right. Following that operation in the French Hospital was a cast applied to your right arm? A. They did. [305]

Q. Will you please point out the area that the cast covered? A. From here to here.

Q. Indicating from the wrist to the elbow?

A. Yes.

Q. Were any casts applied to your right leg?

A. No.

Q. I am speaking now of the French Hospital.

A. No, they did not put any.

Q. Now, was a cast applied to your right leg by any other hospital?

(Testimony of Francisco Pedrasaz Lopez.)

A. Yes, they did here in San Francisco at the Marine Hospital.

Q. What area of your right leg did the cast that was put on your leg at the Marine Hospital extend?

A. From here to here. (Indicating.)

Q. Indicating from the right ankle up to the knee, or was it below the knee?

A. Below the knee.

Q. How long did you wear the cast on your arm, the cast that was put on at the French Hospital?

A. Until I arrived in the Marine Hospital. Then they took it off. I was operated on again and then they put another cast on.

Q. How long did you wear the second cast after you were [306] operated on in the Marine Hospital?

A. I had the first one on for about two to two and a half months.

Q. And how long did you have the cast on that was applied to your right leg at the Marine Hospital?

A. I don't remember exactly, but some six or eight weeks also.

Q. Now, Frank, calling your attention first to your leg injury, did you have any pain in the right ankle area following this accident?

A. Yes, I did.

Q. How long did you have that pain?

A. When it rains or it is cold it gets painful.

Q. Today?

(Testimony of Francisco Pedrasaz Lopez.)

A. Not today.

Q. But during the past few weeks have you experienced trouble or pain in your right ankle?

A. When I work it hurts, it pains.

Q. I see. Mr. Lopez, had you, prior to this injury involved in this case, had you ever injured your, any part of your right leg before?

A. Yes, I did.

Q. Will you tell his Honor what your previous injury to the right leg was?

A. I had an accident and they amputated the five toes. [307]

Q. Where did that occur?

A. In my country, in Spain.

Q. Was that during the Spanish Civil War?

The Court: What has that got to do with this case?

Mr. Vartan: Well, I didn't want the inference that he was accident prone.

The Court: I believe the record shows the toes are missing on both feet.

Mr. Vartan: No.

The Court: One says the right foot and there is a notation, says toes missing on both feet. Ask him that, will you please?

The Witness: No, only one foot.

The Court: Only one.

Q. (By Mr. Vartan): At the Marine Hospital you told us there of one operation on your right wrist. Were there subsequent operations on your

(Testimony of Francisco Pedrasaz Lopez.)

right wrist? A. Yes, they did.

Q. How many? A. Two.

Q. Was the last operation the one where they removed bone from the right hip and grafted it in the wrist? A. Yes, it was.

Q. Frank, at the present time tell us everything that [308] bothers you with your right wrist?

A. I have all these fingers numb and I have no power in my hand.

Q. Do you experience any pain in your hand or wrist?

A. Sometimes the whole arm becomes numb and then I have a pain on the entire arm.

Q. Do you have difficulty holding onto things with that right hand?

A. I sure have.

Q. By the way, Frank, are you right handed or left handed? A. I am right handed.

Q. Do you have any pain in the area of the hip where the bone was removed?

A. That hurts me always when I am walking or when I am working.

Q. Now, when were you able to return to work for the first time following these injuries?

A. I don't remember exactly, but it could have been a year and some months after the accident.

Q. And you worked for Mr. Olivieri?

A. Yes.

Q. Now, this may refresh your memory. You have given me certain tax returns and payroll deductions which shows that you worked in August of

(Testimony of Francisco Pedrasaz Lopez.)

1955. That would be 11 months after this [309] accident.

A. Yes, more or less.

Q. When you went to work for the first time what kind of work did you do?

A. I went to pick flowers.

Q. Did you have any difficulty with either your leg or your arm when you went to work on that first job picking flowers?

A. I had to pick the flowers with the left hand, because I couldn't with the other.

Q. How long did you work on the job picking flowers?

A. One month or one month and a half, more or less.

Q. And then after that did you have a job?

A. Yes, I did.

Q. What did you do?

A. I went back fishing.

Q. How long did you fish?

A. Some four or five months only.

Q. Is there any reason why you stopped that job fishing?

A. I couldn't continue with the job because I had too much of a painful arm and I couldn't work.

Q. When you were fishing did you have to handle the nets? A. Yes, I had to handle them.

Q. Did you handle nets—strike that.

Ordinarily you would use how many hands in handling the nets? [310] A. Both.

(Testimony of Francisco Pedrasaz Lopez.)

Q. Is it true that from the 28th day of September, 1954, until August of 1955 you were not working at any job? A. I was not.

The Court: When did you go to work in August of 1955, what time?

The Witness: I don't remember exactly, but I went out to pick flowers.

Mr. Vartan: Your Honor, for the record we have certain records here. I haven't had a chance to look at them, just came in at 10:00 o'clock, but the record will show, I believe, that he went back to work either the last part of July or the early part of August.

Q. (By Mr. Vartan): Now, before introducing the records, I show you, Mr. Pedrasaz, United States income tax returns for 1952 and 1953, which is a blank which you have some pencilled notations as to the return that you made on 1953 and also your 1954 income tax return.

Are those true and correct copies of the returns which you made? A. They are.

Q. Now, I also show you certain slips of paper signed by Mr. Olivieri which indicates your salary and the deductions for the year 1955 commencing 8-6-1955 and ending, I believe, [311] on November 18, 1955.

Now, do those slips of paper correctly set forth, Mr. Pedrasaz, the earnings that you had from Mr. Olivieri when you first went back to work?

A. They do.

(Testimony of Francisco Pedrasaz Lopez.)

Mr. Vartan: Let the record show that I am showing the document just mentioned to Mr. Nave and Mr. Silvers.

The Court: An examination of the Marine Hospital records shows that this man was certified to go back to work on July 26th, 1955. It appears the maximum period of maintenance that you can claim would be on the date of his discharge from the Marine Hospital from October 13, 1954, to February 14, 1955, and from February 26, 1955, to July 26, 1955. Have you calculated those days?

Mr. Vartan: No, your Honor, we just got the records.

The Court: All right. Appears to be, from these records that you have introduced, his only claim for cure would be a total of two bills which were incurred down at Monterey of \$167.37.

Mr. Vartan: Correct, your Honor.

The Court: All right.

Mr. Nave: We have no objection to the introduction of these income tax returns.

Mr. Vartan: Before offering them into evidence I [312] will ask the witness a question.

Q. (By Mr. Vartan): Now, from the payroll deductions from your flower picking job with Mr. Olivieri, it indicates that from 9-6, for one month—that ending 9-6, one month you had gross earnings before deductions of \$232.65, is that correct?

A. Yes.

Q. And then the following month you had a gross income of \$364.19?

A. Yes.

(Testimony of Francisco Pedrasaz Lopez.)

Q. Was that about your average monthly gross income working with the flower job?

A. No, when I was working on the flower I only earned a dollar an hour.

Q. I see. Now, the first payroll deduction here, it says period ending 8-6, that would be August 6, 1955, \$287.92, and there is a notation in ink, "Half a month." Now, obviously it's an error, your Honor. Did you earn \$287.92 the first month that you worked, or was that only for two weeks?

Mr. Nave: Just a moment, if the Court please. I object to counsel impeaching his own witness.

Mr. Vartan: I am not impeaching. We have got these records and it shows—it is obviously an error, Your Honor. Over in that corner, Your Honor, there is a half and when you compare it with the other full monthly gross, it is [313] obviously an error.

The Court: I think what has been torn off is a one, and apparently it is one and a half months.

Mr. Vartan: Could be; I don't know.

The Court: All right. I think the papers speak for themselves, since this witness didn't write it out himself. He can't explain it anyway. Might ask him when he started to work here.

Mr. Vartan: Yes, I did, your Honor, and of course it is established it was around August.

The Court: All right.

Mr. Vartan: So that is the closest we can come.

We offer, then, the tax returns and the payroll deductions which have been previously described for the record as Libelant's Exhibit next in order.

(Testimony of Francisco Pedrasaz Lopez.)

The Clerk: Libelant's Exhibit 9 introduced and filed into evidence.

(Whereupon, the income tax returns above referred to were received in evidence as Libelant's Exhibit 9.)

The Court: Shall we have a recess?

Mr. Vartan: Yes, I didn't realize the time.

Yes, your Honor.

(Short recess.)

The Court: When we adjourn for lunch I would like to have you come in a few minutes. [314]

Counsel, may I call your attention to the fact that you have not produced the witness' tax returns for the year 1955 or 1956.

Mr. Vartan: Well, that is the only thing—his wife speaks English and she mailed those up with him. I will ask, your Honor.

The Court: Let's proceed.

Q. (By Mr. Vartan): Now, Mr. Pedrasaz you have not, or we do not have at the present time your tax returns for 1955 and 1956. Were tax returns made for those years? A. Yes, I did.

Q. And did you do that or did someone do it for you?

A. Another person did it for me, for my wife, my wife is the one that takes charge of that.

The Court: How much did you make in 1955?

The Witness: I am not so sure, but somewhere around \$4,000.00.

(Testimony of Francisco Pedrasaz Lopez.)

The Court: How much did you make in 1956?

The Witness: More or less the same.

The Court: What is your rate of pay now, what are you working at now?

The Witness: Butcher.

The Court: How much do you get, about how much?

The Witness: Ninety-six. [315]

The Court: \$96.00 a week?

The Witness: Per week.

The Court: Do you belong to the union?

The Witness: Yes.

The Court: Now, what do you do as a butcher, what type of work do you?

The Witness: I work where they slaughter the animals.

The Court: In a slaughter house?

The Witness: Yes.

The Court: What do you do in the slaughter house?

The Witness: The work I do now is cleaning the heads.

The Court: What do you kill there, beef?

The Witness: Beef, lamb.

The Court: Beef and lamb. How heavy a beef run, how heavy does the beef run?

The Witness: About 110.

The Court: You able to cut down the beef yourself and handle it?

The Witness: No, I do not, I only take the meat out of here(pointing to the head), from the bone.

(Testimony of Francisco Pedrasaz Lopez.)

The Court: Pointing to the glands?

The Witness: No, the one here on the [316] cheeks.

Q. (By Mr. Vartan): Now, I don't know whether I asked this witness, so I will be sure, at the present time, Frank, what about the feeling, do you have feeling in your fingers of your right hand?

A. Yes, I do.

Q. Is there any numbness there?

A. Yes, almost every day it becomes numb and I have to put the hand in cold water.

Q. I see. When you put it in cold water can you feel the cold water in your fingers?

A. I do.

Mr. Vartan: You may cross-examine.

Cross-Examination

By Mr. Nave:

Q. Mr. Pedrasaz, you say when you went in the kitchen you didn't see the cook in there?

A. I don't know whether he was in there or not, I paid no attention. I was too hungry, I went to get these potatoes.

The Court: You were a butcher before this explosion, weren't you?

The Witness: Yes.

The Court: How long you been a member of the butcher's union?

The Witness: Some five years. [317]

(Testimony of Francisco Pedrasaz Lopez.)

The Court: And you are still able to work as a butcher, aren't you?

The Witness: Yes. The arm bothers me, but I have a family to support.

The Court: I see.

Mr. Nave: Your Honor, in the interests of time, if it is agreeable with the Court and counsel, the deposition of Mr. Pedrasaz was taken October 24, 1955, through a Spanish interpreter, and there are a number of portions of this deposition that are at variance with his testimony here and if the Court will permit it, and counsel agree, I could save time by reading the portions of the deposition that are adverse to his testimony here and save considerable time.

The Court: Any objection on that?

Mr. Vartan: No, except, your Honor, I wasn't present at Monterey when that deposition was taken, but I think Mr. Silvers and Mr. Whelan and Mr. Nave were there, and it was my understanding that the interpreter they had at that time had great difficulty in interpreting because of the particular type of Spanish that this man speaks. In fairness to the Libelant I think that should be understood. I think both Mr. Silvers and Mr. Nave will admit they had one terrible time because at times Mr. Silvers would correct the interpreter's interpreting.

Mr. Nave: I have no objection to his Honor reading [318] the entire deposition and drawing his own conclusion about that. I don't agree that there was any terrible time as far as interpreting is concerned. How about that, Mr. Silvers?

(Testimony of Francisco Pedrasaz Lopez.)

Mr. Silvers: No difficulty, in my opinion, in the interpreting. I don't know so far as——

Mr. Whelan: There was no question there was a lot of difficulty.

Mr. Silvers: I don't know how extensive Mr. Nave's readings are going to be.

Mr. Nave: Not going to be extensive. Some excerpts from it, adverse testimony, that is all.

Mr. Vartan: We have no objection to the Court reading the entire deposition but with that understanding so that we don't prejudice this man's rights, that is all.

The Court: Then you consent that the deposition be received in evidence?

Mr. Silvers: I don't enter into that consent, your Honor.

The Court: I think you better proceed; apparently nobody wants it.

Mr. Nave: Very well.

Q. (By Mr. Nave): Mr. Pedrasaz, you recall your deposition was taken on October 24, 1955, at Monterey?

Mr. Vartan: Counsel, in fairness to the [319] witness it was taken in Salinas.

Mr. Nave: The cover says Monterey, the County of Monterey, Salinas, and County of Monterey.

The Witness: Yes.

Mr. Nave: I should know, I was there.

Q. (By Mr. Nave): You recall that and there was an interpreter there? A. I do.

(Testimony of Francisco Pedrasaz Lopez.)

Q. And I asked you some questions at that time about the explosion and you gave certain answers?

A. I replied, but I don't know how the interpreter put the translation because I couldn't understand the woman, I couldn't understand her too well.

Q. I will ask you if these questions were asked to which you gave these answers. Referring to page 20, first question, line 10.

"Question: I will ask the question again if you didn't understand it. Where were you, yourself, on the boat when the explosion occurred?"

To which you answered:

"Answer: It's kind of difficult to point the exact spot where I was, since there is no boat to point out."

Does your Honor want the interpreter to interpret this? [320]

The Interpreter: May I have it? It is a little bit too long.

Mr. Nave: I will give it to you to read if we have to go through it.

The Court: What page are you reading from?

Mr. Nave: On page 20, and my first question commences on line 10.

The Interpreter: May I proceed to read it to him?

Mr. Nave: Yes, read the question and the answer.

The Court: What does he say? Did he make that answer?

(Testimony of Francisco Pedrasaz Lopez.)

The Witness: It is kind of difficult to point—yes.

Q. (By Mr. Nave): The next question on line 23, Mr. Interpreter.

The Court: Suppose you read it out in English.

Q. (By Mr. Nave): “Question: And what had you been doing there?

“Answer: Just a few minutes before, before we brought up that twenty gallons of gasoline that Frank had requested I went into the kitchen and I had a few fried potatoes.”

A. I didn't say it in that manner. [321]

Q. The next, and continuing his answer, commencing on line 11:

“Answer (Continuing): When I was standing or came out of the kitchen I saw the cook coming out and he looked at me and he was very angry at me because of what I had done (referring back to the potatoes). At that moment I saw the man that works for the oil company with something that turns out the fire, the fire extinguisher, but I didn't pay very much attention. I had just bent over to throw out some fish called anchovy and it was at that moment when I heard the explosion.”

A. That wasn't my answer to the interpreter, at the time.

Q. On page 22, line 18:

“Question: Didn't you say that he was angry with you?”

To which you answered:

“Answer: I saw him coming. I didn't give him

(Testimony of Francisco Pedrasaz Lopez.)

a chance to say anything, I bent over and put—and covered my mouth and it was about that time that the explosion was heard.”

A. No, I did not, because I did not see the cook.

Q. And continuing on, the next question, line 22, the [322] question and answer as follows:

“Question: Were you below deck when the explosion occurred?

“Answer: As I was coming out—when I came out of the kitchen I saw the man directly above me, the man that was running that was working—that gave the stuff to make the gasoline, the man that gave the hose or brought in the hose to put in the gasoline.”

A. No, I did not.

Q. That is not true?

A. I did not answer in that manner. I don't think that interpreter understood me or couldn't translate what I was saying.

Q. You didn't say that? A. I did not.

Q. Question continuing:

“And he was running?

“Answer: Yes, he ran up and that's when I saw him picking up that stuff—the fire extinguisher—and I was bending over and it was at that time that I heard the explosion.”

A. I replied to these questions, but I was not bending over when I saw this man, I was standing in front of the [323] kitchen when I saw him.

Q. The next question:

“Question: He was running with the fire extinguisher in his hand before the explosion?”

(Testimony of Francisco Pedrasaz Lopez.)

To which you answered:

“It happened just about two seconds. All I had time was to come out, saw him at a glance, and I bent over and it was at that time that I heard the boom! Boom!”

A. The declaration that I made is one that I made in Salinas and the same as I am making here today.

Q. The next question on line 17, same page:

“Question: Was there any fire on the boat at that time?

“Answer: No, the boat—there was no fire on the boat until three or four minutes after that.”

A. I did reply that way.

Q. On page 24, commencing on line 8:

“Question: You have stated, have you not, that before the fire and explosion on the boat you saw the man, the gasoline service station man, running with a fire extinguisher in his hand, is that correct?

“Answer: I saw him running and I just [324] took it for granted or supposed that he did have the fire extinguisher because it was at that time that I heard the blows, boom! Boom!”

A. Yes.

Q. The next question:

“Question: Did you see a fire extinguisher in his hand?

“Answer: Yes, right after the explosion I came up and I saw him still holding the extinguisher but there was no actual fire at that time.”

A. When I saw him it was before the explosion.

(Testimony of Francisco Pedrasaz Lopez.)

Q. Did you give that answer to that question?

A. That is not the manner in which I replied.

Q. Now, on page 25, line 13:

“Question: Now, will you please explain to me, if you will, please, whether or not the man you saw running with a fire extinguisher in his hand was doing so before or after the explosion?”

“Answer: As I said before, I saw him running and right a second later or about the same time I heard the explosion. I couldn’t even tell whether the explosion [325] was right at the boat or from the wharf.”

A. I told the interpreter to tell them that when I heard the boom! Boom! I had seen the man running with the fire extinguisher before that boom! Boom!

Q. You did not give that answer?

A. That is what the interpreter put. Yes, I did.

Q. All right. At the bottom of page 28, the last line:

“Question: And where was the man running from and to, what point was he running when you saw him with the fire extinguisher in his hand?”

“Answer: I didn’t have—have time to notice and I didn’t have a chance to find out. I was just bending over throwing the anchovies when the explosion was heard.”

A. The interpreter put it somewhat different from what I said.

Q. Now, on page 29, the question following that:

“Question: Now, when you—strike that.

(Testimony of Francisco Pedrasaz Lopez.)

When the Santa Lucia first went up to the dock to get gasoline where were you?

“Answer: We had just finished tying up the boat. I went into the kitchen and was just coming out when the explosion occurred.” [326]

A. No, I did not answer like that.

Q. On page 39——

Mr. Whelan: Mr. Nave, the next line, line 11, the same page, one of the attorneys said he didn’t understand the question, it wasn’t interpreted right, and it was done all over again.

Mr. Nave: What page was I on?

Mr. Whelan: You were on page 29, line 11.

Mr. Nave: Thank you. I will be glad to read any part of it or all of it, I offer to put the whole thing in evidence, renew my offer.

“Mr. Whelan: He did not understand the question.

“Q. (By Mr. Nave): I am speaking now of before the explosion. Where were you when the boat first came up to the dock to get gasoline?

“Answer: You mean before the boat arrived by the wharf?

“Question: Yes.

“Answer: Right at the border, the border where all the rest of them were working.

“Question: And what were you doing then?

“Answer: We were cleaning the boat and throwing off the fish, the old fish before [327] arriving at the wharf.”

Is that what you wanted me to read?

(Testimony of Francisco Pedrasaz Lopez.)

Mr. Whelan: Yes.

Q. (By Mr. Nave): Now, on page 39, line 19:

“Question: Now, at the time of the explosion and fire when did you first notice a fire any place?”

“Answer: After the explosion at the wharf.”

A. That is correct.

Q. The question following:

“Question: Did you see any fire on the boat at all?”

“Answer: No, about four minutes after the explosion I saw the wharf burning, but just the wharf, and then the boat started on fire.”

A. I told the interpreter to explain that after the explosion on board the ship I saw the fire when I was trying to save my life and I was on the skiff. The pier was already on fire then. It was about four or five minutes afterwards when the boat began to burn, what I said.

Q. The next question, bottom of page 39:

“Question: The first fire that you saw [328] on the boat was about four minutes after the explosion?”

“Answer: Yes, not exactly, but it could have been three or four minutes. Since I had my hand—my arm or hand, and my leg broken, I can imagine it was about three or four minutes when the wharf was on fire — three or four minutes before the boat started to burn or fire.”

Did you give that answer to that question in your deposition?

A. That is not what I told the interpreter.

Q. What did you tell the interpreter?

(Testimony of Francisco Pedrasaz Lopez.)

A. What I told the interpreter to repeat was that when I looked up, I put my head up and looked up, the pier was on fire and that about three or four minutes later the boat began to go on fire.

Q. On page 41, question and answer on line 4.

“Question: Now, describe exactly where the fire was in the hose that you saw.

“Answer: When the explosion was heard I looked up but I couldn’t tell whether that explosion occurred on land or in the boat. I just remember looking up and I saw the wharf on fire. All I did when I found out that my arm was broken, I just ran out to [329] save my life.”

A. Yes, I did.

Q. On page 42, line 14:

“Question: How long before or after the explosion did you see a fire on the wharf?

“Answer: A few seconds, that’s all.”

A. Yes.

Q. The next question:

“Before or after?

“Answer: After the explosion.”

Q. That’s correct, isn’t it—well, let me read that.

“Question: In other words, there was an explosion first, isn’t that correct?

“Answer: I don’t know exactly. I heard two boom! Boom!”

A. Yes.

Q. That is correct, isn’t it? I have no further questions.

(Testimony of Francisco Pedrasaz Lopez.)

The Court: Do you have any questions?

Mr. Silvers: One, your Honor.

Cross-Examination

By Mr. Silvers:

Q. I want to show you a photograph, Mr. Pedrasaz; do you recognize it as showing generally the scene of the wharf where this explosion took place? The photograph was taken after the [330] explosion. You recognize the general area?

A. I do.

Q. I am calling your attention to an ink mark on the photograph and ask you with reference to the one mark P-7, if that is the approximate location where you saw the Union Oil man with the fire extinguisher?

A. That was exactly where he was.

Mr. Silvers: We will offer this in evidence, your Honor, as Libelant's Exhibit Cardinale next in order.

The Clerk: Respondent Cardinale's Exhibit I introduced and filed into evidence.

(Whereupon the foregoing photograph was marked and introduced into Evidence as Respondent Cardinale's Exhibit I.)

Mr. Silvers: I have no further questions.

Mr. Vartan: No questions.

The Court: Thank you.

Suppose we adjourn; what time do you want to get back?

Mr. Vartan: Two o'clock, your Honor?

The Court: Two o'clock. All right, and can you come inside for a few moments?

Mr. Vartan: Your Honor please, so that all the attorneys know, Mr. Silva has to leave, he won't be back.

The Court: We are through with this [331] witness?

Mr. Vartan: Yes.

(Whereupon Court was adjourned until 2:00 o'clock p.m. of this date.)

2:00 P.M.

Mr. Vartan: At this time, may it please the Court, we offer the deposition in the case of Antoine Belleci as Administrator of the Estate of Jacques Cardinale, we offer the deposition of Marie Cardinale, taken in Algiers on the date shown. All counsel, I believe, have copies of this deposition and will it be stipulated deemed read in the record?

Mr. Nave: Yes, so stipulated.

Mr. Silvers: Yes.

The Clerk: Mark that in evidence?

The Court: Yes, then give it to me.

The Clerk: Libelant's Exhibit 10 introduced and filed into evidence.

(Whereupon the deposition of Marie Cardinale was introduced and marked as Libelant's Exhibit No. 10 in Evidence.) [332]

Mr. Nave: May I see that, your Honor, to see if the cross-interrogatories are all there? I think they

are. The cross-interrogatories are attached to that, your Honor.

Mr. Vartan: Now, your Honor, on a prior occasion we offered the deposition of Francois Cardinale who is now in Algiers, and at that time, your Honor, counsel stated that the following day they were to point out any objections they had.

The Court: I assume that if they didn't do so they had none and I have had none placed upon the record. Therefore, I assume they had no objection to any of the interrogatories.

Mr. Nave: That is correct, your Honor.

Mr. Silvers: That is correct.

Mr. Vartan: May it be stipulated the deposition is deemed read into the record?

Mr. Nave: So stipulated. We will mark it in evidence.

Mr. Vartan: We will call Mr. Charles Caldwell to the stand, please.

CHARLES HERBERT CALDWELL

called as a witness by the Libelants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the [333] Court?

The Witness: Charles Herbert Caldwell.

Mr. Vartan: May the record show that this witness is called as an adverse witness, your Honor?

The Court: You don't have to; you may make that statement.

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: My worthy opponent advised me I should, so it is his responsibility.

The Court: We don't do that.

Mr. Vartan: All right.

The Court: If it is the custom here you can follow the local custom. This witness is Charles Herbert Caldwell.

Direct Examination

By Mr. Vartan:

Q. Mr. Caldwell, on September 28, 1954, you were employed by Respondent Union Oil Company of California? A. Yes, sir.

Q. Your employer owned and operated the sales or gas dock involved in these actions, is that true?

A. Yes, sir.

Q. Will you tell us very briefly what your duties were?

A. My duties as a launchman were to operate and take care of the boat, to act as a leadman among the wharf crew and make sales to fishing boats, rather vessels. [334]

Q. And the sales you mentioned that you made to other fishing boats and other vessels were made from the gas dock situated on an offset of the main wharf, is that right? A. Yes, sir.

Q. On September 28, 1954, Mr. Caldwell, when did you first observe the fishing vessel Santa Lucia?

A. I observed the fishing vessel as it approached from the southeast.

Q. It approached from the high seas, that is,

(Testimony of Charles Herbert Caldwell.)

from the seaward? A. That is correct, yes.

Q. Where were you when you first observed the Santa Lucia?

A. I was in the neighborhood of the foreman's office on the main dock.

Q. Now, you have been in court most of the trial, so I assume you have seen this diagram, have you not? A. This is my first day.

Q. Oh. Well, you have been here this morning?

A. Yes, sir.

Q. There is a designation of the wider area of the wharf between the notations Berth 4 and Berth 5, there are two squares with the notation "Change Room" and "Office." Were you in the vicinity, then, of one of those places?

A. Yes, the southern building.

Q. That would be the office? [335]

A. Yes, sir.

Q. Who else was present with you at that time?

A. Mr. Johnson was inside the office.

Q. Who else?

A. There were other men on duty at that time, but I believe we were the two that were together at that moment.

Q. I see. Now, when you saw the Santa Lucia it was approaching the area designated on the diagram, and I should mention in the last question, when you identified where you were, that's the diagram designated as Libelant's Exhibit No. 2, for the record.

Now, when you noticed the Santa Lucia approach-

(Testimony of Charles Herbert Caldwell.)

ing, it was approaching the area marked Berth 4, was it not?

A. Yes, it was approaching towards Berth 4.

Q. Did you have a conversation with anyone on the Santa Lucia, Mr. Caldwell, when it arrived or approached Berth 4? A. Yes.

Q. Will you please state what that conversation was?

A. When the vessel came within hailing distance somebody on the bridge told me he wanted some gasoline and I asked how much, with respect that I knew we had another tanker coming and I wanted to plan my work if I could to complete the sale——

Q. Just answer the question, Mr. Caldwell, please. What conversation did you have, not what you thought.

A. All right. He so stated he wanted about thirty gallons [336] of gas.

Q. All right, when you say he, that was someone on the Santa Lucia?

A. Somebody on the overheads.

Q. I see. And then did you say okay?

A. I told him where to tie up here at the gas dock, yes, sir.

Q. And the area of Berth 4 is about 450 feet from the gas sales dock, isn't it, approximately?

A. Roughly, yes.

Q. What type of gasoline did you sell at that gas dock?

A. We had one product; it was regular.

Q. Regular gasoline. Your brand, I believe, is 76, is that right? A. 7600.

(Testimony of Charles Herbert Caldwell.)

Q. Yes. For the record that is the ordinary commercial gasoline that is used in automobiles and engines of various types, isn't that right?

A. I believe it is.

Q. Then am I correct in saying, Mr. Caldwell, that you walked from the area that you were when you had the first conversation that you have just related to the sales dock, did you not?

A. After picking up my cash box and sales ticket I walked down to the gas landing. [337]

Q. And the Santa Lucia was being tied up at the sales dock, is that true?

A. I arrived there first as he was approaching.

Q. Then you watched it tie up? A. Yes.

Q. Mr. Caldwell, is it not a fact that when you arrived at the sales dock and after the vessel tied up you were told by a man on the Santa Lucia the capacity of the gasoline tank to be filled?

A. No, sir.

Q. Do you deny he told you how much the tank would take?

A. He did not tell me the capacity of the tank.

The Court: What other conversation did you have with this man? You told us that he was—you asked whether he wanted gas and he said yes. You asked him about how much, or how much, did you?

The Witness: Yes, sir.

The Court: And he said about 30 gallons?

The Witness: Correct.

The Court: Then directed him down to where the pump was?

(Testimony of Charles Herbert Caldwell.)

The Witness: Yes.

The Court: And he docked there?

The Witness: Correct.

The Court: You walked down? [338]

The Witness: Well, I was there first when he tied up.

The Court: What happened after that? Let's get his story first and then you may examine him, if you want. I prefer that he first tell, give his testimony, then you may cross-examine, if you will.

Mr. Vartan: All right, your Honor.

The Court: What happened?

The Witness: I again asked him how much gas he would use and he told me it would be about thirty gallons. I then gave him the gasoline hose, and as I was delivering it to him I asked him for his name, and he in turn told me that he was Frank Cardinale from Monterey.

I then, after he had received the hose and was preparing to fill his tanks I went in and checked my credit book and I found out that Frank Cardinale's name was associated with the Santa Lucia and I was assured his credit was in good standing.

Q. (By Mr. Vartan): Now, you have already told me that he didn't tell you how much the tank would take.

Now, counsel, I am referring to a statement which was furnished in this matter, statement of Charles Caldwell. It is your statement, counsel, you furnished it.

Mr. Nave: Your Honor, please, I don't quite

(Testimony of Charles Herbert Caldwell.)
understand [339] the purport of this line of questioning. I have no objection to the statement being presented to the Court.

The Court: I don't know and there is nothing before me now except conversation between counsel. I suggest we proceed with the trial and then if something is done you can put your objection on the record. I have nothing before me at this time.

Q. (By Mr. Vartan): Mr. Caldwell, I show you what purports to be the statement of Charles H. Caldwell, launchman, Avila Wharf, Northern Division, Pipeline Department, and ask you if that statement bears your signature and you gave that statement.

The Court: Does this paper that counsel now shows you bear your signature?

The Witness: Yes, it does.

The Court: And is it signed on each page, or is it only one page?

The Witness: These are duplicates, aren't they, signed on each page?

Mr. Vartan: Yes, there are two copies.

Q. (By Mr. Vartan): It is signed on each page, is it not? A. Yes, sir.

The Court: You offer it in evidence?

Mr. Vartan: Yes, your Honor. [340]

The Court: Any objection?

Mr. Nave: No objection, your Honor.

The Court: Received in evidence without objection.

(Testimony of Charles Herbert Caldwell.)

The Clerk: Libelant's Exhibit 11 introduced and filed into evidence.

(Whereupon, the foregoing statement of Charles Caldwell was introduced and filed into Evidence as Libelant's Exhibit No. 11.)

The Court: You say you had an extra copy of that, counsel?

Mr. Vartan: Yes, your Honor. Here, you can give his Honor the one that is marked.

Q. (By Mr. Vartan): I will ask you if you made this statement and signed your name to it: "As he took the hose I asked him approximately how much gasoline he would need. He replied that she will take about thirty gallons."

Did you make that statement?

Mr. Nave: We will stipulate, if the Court please, the statement was signed.

Mr. Vartan: I would like to cross-examine——

The Court: That's not an objection, the objection is overruled if it is intended to be that.

Q. (By Mr. Vartan): Did you make that statement that he told you that the [341] tank would take—that she will take thirty gallons?

Mr. Nave: Your Honor please, I object to this method of interrogation. There is no foundation laid for any attempt to impeach.

The Court: Overruled. Did you make that statement?

The Witness: I believe I said she would take about—he said she would take about thirty gallons.

(Testimony of Charles Herbert Caldwell.)

Q. (By Mr. Vartan): Then he did tell you the capacity of the tank or how much gasoline the tank would——

Mr. Nave: Your Honor please, that is objectionable——

The Court: Objection sustained.

Mr. Vartan: All right.

The Court: A conclusion.

Q. (By Mr. Vartan): And when the man said, "She will take about thirty gallons," you understood, "She" to mean the vessel, did you not?

A. Yes, sir.

Q. Mr. Caldwell, was this conversation before or after a fuel hose was passed down to the vessel?

A. That was as I passed the hose to the man on the boat.

Q. Very well. And after the hose was passed, was it passed to the same man that you had the conversation with? A. At what time? [342]

Q. When you first passed the fuel hose down to the vessel was it to the same man with whom you had had the conversation?

A. I believe it was.

Q. After passing the fuel hose down to the man on the vessel you checked a meter which was on the dock, did you not? A. Yes, sir.

Q. And you made sure that the meter registered zero? A. Correct.

Q. Now, Mr. Caldwell, the offset where the gasoline was sold by your company is located on the diagram, and enlarged right below it. Now, the meter,

(Testimony of Charles Herbert Caldwell.)

which we just talked about, is located, is it not, six feet from the edge of the dock which was closest to the vessel? A. Approximately, yes.

Q. Now, this diagram is scaled ten feet to the inch. Would you please mark the location of the meter on the diagram?

Wait, this is ten feet to the inch, so if you will mark it on that.

A. The gasoline meter was located approximately in this position right here.

Q. Make an X and mark that C-1 as being the position of the meter.

Mr. Nave: Counsel, would you mind, if it is agreeable to the Court, writing the words "Gas Meter" on the diagram? [243]

Mr. Vartan: Write under C-1 what counsel suggests.

Q. (By Mr. Vartan): Pointing to a circle on the enlarged portion of the gas dock I notice the words 76 gasoline inside of a circle. Is that where the gasoline storage tank was? A. Yes, sir.

Q. And that's equivalent to this one on this diagram, is that right? A. Yes.

Q. How did the gasoline come out of that tank, by what method? A. Two inch pipe.

Q. And that two inch pipe was attached to the tank, the storage tank at what position of the tank, at the bottom or top or in the middle?

A. At the lower level of the tank.

Q. And will you point out where the two inch pipe was attached to the tank insofar as the circle

(Testimony of Charles Herbert Caldwell.)

is concerned? A. (Witness marking.)

Q. Now, from there will you take the pencil and show where the gas line emanating at that point finally came to the meter?

A. (Witness marking): About in here.

Q. You have got an X there where the meter is and marking the meter on the enlarged portion of it, and I will make the [344] line, Mr. Caldwell—draw a little heavier so it can be seen.

Now, from the meter where did the gas flow, in what direction?

A. It went straight ahead to about this position here where it joined the hose reels.

Q. And the hose reel was how far from the edge of the gas dock?

A. It was right at the edge of the gas dock.

Q. Well, you have it marked somewhat—

A. Back in here.

Q. So I will mark this C-2, the hose reel.

Now, on either side of the meter, Mr. Caldwell, was a valve, was there not? A. Yes, sir.

Q. And how far from the meter were these valves, right at the meter?

A. Not right at the meter, it was a short interval between the valve and the meter.

Q. Now, will you put a line like that across to indicate the location of the valves at the meter?

A. (Witness marking.)

Q. That will be marked C-3, "Valves."

Now, you may sit down.

Those valves, Mr. Caldwell, would turn off or turn on the flow of gasoline, would they not? [345]

(Testimony of Charles Herbert Caldwell.)

A. Yes, sir.

Q. And they were handled manually?

A. That's correct.

Q. How much of a turn—strike that.

Were both valves of the same type? I mean, were they similar in nature, both valves?

A. Both made by the same company.

Q. Mr. Caldwell, how much of a turn would it take to turn off the flow by the use of these valves?

A. They were a plug-type valve, a quarter turn would open or close it.

Q. A quarter of a turn. Do they have a lever attached or handles? A. Yes, sir.

Q. How long was the handle or lever?

A. It was a T-handle and it would be about eighteen inches.

Q. I see. Now, after passing the hose to the man on the vessel you turned on the flow of gasoline by turning those valves, did you not? A. Yes.

Q. Before doing that you checked the meter to see that it registered zero, did you not?

A. Yes.

Q. Mr. Caldwell, did you see the man on the Santa Lucia open a vent or fill pipe which was on the deck of the vessel? [346] Did you actually watch him do that?

A. No, I don't believe I did.

Q. Did you pay any particular attention to the fill pipe, that is, as to its construction or type?

A. Yes, I did.

Q. Will you tell his Honor what you observed, of the type of fill cap?

(Testimony of Charles Herbert Caldwell.)

A. It was a flush type fitting, it was flush with the deck.

Q. You could tell that. How far below you on the dock was the Santa Lucia, the deck of the Santa Lucia?

A. At that position it was about eight or nine feet below me.

Q. Well, were portions of the Santa Lucia lower than others, the deck of the Santa Lucia?

A. No.

Q. Isn't it a fact, Mr. Caldwell, that the deck of the Santa Lucia was twelve feet below the level of the dock? A. Well, this is just an estimate.

Q. Now, the Santa Lucia is tied up, and so far as direction is concerned it is correctly depicted on the diagram, is it not?

A. She was tied up port side to, that's right.

Q. You had worked on the gas dock in the sale of gasoline to fishing vessels how long prior to this particular day? [347]

A. Oh, I had fueled vessels—I first went to work there in 1946.

Q. I see. Now, you knew that on some fishing vessels the fill pipes which came up to the deck were flush and sealed with the deck, you knew that, is that right?

A. Would you state your question again?

Q. Would you read the question, please?

(Record read by the Reporter.)

A. Some types, yes, yes.

(Testimony of Charles Herbert Caldwell.)

Q. Then you also, in the years that you worked there knew there were some fill pipes that would not be flush with the deck and seamed tight with the deck at the top, is that true?

A. There are a few boats made this way, yes.

Q. And the ones that are made that way have two caps, a plate is removed on the deck of the vessel and then a cap underneath the plate is removed from the pipe itself; isn't that true?

A. Yes, sir.

Q. The intake pipe or fill in those cases, in those particular installations, is not flush or seamed tight with the deck?

A. If that were the construction it would not be sealed tight.

Q. I see. If there is an overflow on the second type we are talking about the overflow would not flow onto the deck but flow back around the fill pipe, isn't that true? [348]

A. That could be possible.

Q. Yes. Now, Mr. Caldwell, did you stand and watch anyone on the deck of the Santa Lucia during the entire fueling operation?

A. Yes, sir.

Q. You stood at one place?

A. Not the entire time, no.

Q. Incidentally, did you identify, after this talk about credit rating, did you identify the man you were talking to on the vessel as Mr. Frank Cardinale?

A. The gentleman that accepted the hose told me his name was Frank Cardinale.

(Testimony of Charles Herbert Caldwell.)

Q. Very well. Now, did you continue to watch Frank Cardinale after you handed him the gas hose? A. Yes, I did.

Q. How long did you continue to watch him?

A. Maybe a minute, two minutes. I had a short conversation with him.

Q. Then you left, and then you did not watch him, is that true?

A. No, I went about my other chores.

Q. All right. You knew, Mr. Caldwell, that there was no gage or meter at the fill vent or fill pipe of this vessel, did you not?

A. The meter is on the dock. [349]

Q. You knew that there was no meter on the boat? A. Yes.

Q. You knew that?

A. No, sir, I did not know there is no meter on the boat.

Q. Did you see a meter at the gas vent where the gas was being filled?

A. I didn't see any, no.

Q. All right, you just saw a hole, didn't you?

A. Yes, sir.

Q. Now, the meter that you had on the gas dock was, I believe you said, six feet back from the edge of the dock at this position? (Indicating.)

A. Approximately six feet.

Q. You knew that the man on the vessel could not see that meter during the fueling operation, didn't you? A. I don't think he could.

(Testimony of Charles Herbert Caldwell.)

Q. As a matter of fact, the meter was 26 inches above the highest point—the highest point of the meter was 26 inches above the floor of the dock, isn't that true?

A. The meter sat on an 8 inch wood block and the meter was roughly 18 inches high.

Q. So that would make it 26 inches?

A. Approximately.

Q. Will you tell his Honor what type of face or dial that this meter had? [350]

A. I am really not sure what type it did have. We had two different types of meters.

Q. Well, suppose you describe both of them.

A. The meters were made by Brodie. They were both the same body type, but one had a small computing space which was about four inches by six inches with figures inside that turn over; and the other type was a—had a clock type face on it, about a 12 inch clock face.

Q. And both of these, whether it was the clock face or the other type that you first described, the face or dial in both instances would not be facing the vessel as it was tied up, would it?

A. Yes, they would.

Q. You have testified that anyone on the vessel could not see the meter from the deck of the vessel.

A. I don't think he could.

Q. All right. I will ask you specifically, Mr. Caldwell, wasn't the deck of the vessel 12 feet below the gas dock?

A. This is purely an approximation. It was 15

(Testimony of Charles Herbert Caldwell.)

foot to the water level, 15 to 17 foot, depending on the tide, and he had so much freeboard above that.

Mr. Vartan: Calling your attention, counsel, to page 28, line 24 of the deposition of Charles Caldwell, the deposition being taken Friday, September 23, 1955.

“Question: Now, at that point how far [351] below the level of the sales dock was the main deck of the boat?

“Answer: Oh, that part of the deck that was forward and that was—rose from, I probably say it was around 12 feet.”

Now, you recall giving that answer to that question?

A. Yes, sir, that was an approximation.

Q. I see. You feel now that that is your best judgment, it was about 12 feet rather than 8 feet?

A. All right, 12 feet.

Mr. Silvers: Was there an answer?

Mr. Nave: He said, “All right, 12 feet.”

Q. (By Mr. Vartan): Mr. Caldwell, during this entire fueling operation the meter on the Union Oil sales dock, which you have marked on the diagram, was under your exclusive control, was it not?

A. I was the only employee there at the time.

Q. I see. No one else was present?

A. No, sir.

Q. No member of the crew was on the sales dock? A. No, sir.

Q. During the entire fueling operation, Mr. Caldwell. that meter was within your view, was it

(Testimony of Charles Herbert Caldwell.)

not? A. Part of the time.

Q. What was the position of Mr. Cardinale at the fill pipe [352] when you last saw him after handing down the hose—you stated you had a conversation with him for a minute or so—what was his position? Was he standing, kneeling, squatting, or what was he doing? A. Kneeling.

Q. He was kneeling?

A. Kneeling, filling his tank.

Q. I see. Mr. Caldwell, after you had the conversation that “She will take thirty gallons,” and you checked the meter and saw that it was at zero and you turned on the gas slow, did you continue to watch the gas meter?

A. I never said she would take thirty gallons, I said, “She would take about thirty,” purely an approximation.

Q. All right. After you heard Mr. Cardinale tell you she will take about thirty gallons, did you continue to watch the gas meter?

A. No, I didn’t.

Q. There was no emergency or anything that took you away from the gas dock during this fueling operation, was there?

A. No, I didn’t leave the gas dock.

Q. Now, you have told us you looked at the gas meter when it registered zero before starting the fueling operation. When did you, did you look at it again? A. I certainly did.

Q. And when you looked at it again what did it register? [353]

(Testimony of Charles Herbert Caldwell.)

A. It was approximately 20 gallons.

Q. At that point, Mr. Caldwell, when it registered 20 gallons, did you yell down to Mr. Cardinale and tell him he had taken 20 gallons, or that 20 gallons was registered on the meter? A. No.

Q. When you saw that meter showing 20 gallons did you look down at Mr. Cardinale to see what he was doing? A. No, sir.

Q. As far as you know he may not have even been there, isn't that true?

Mr. Nave: Object to that as being argumentative.

Mr. Vartan: Very well, withdraw the question.

Q. (By Mr. Vartan): Did you tell anyone else on the vessel that at that particular point the meter registered 20 gallons? A. No.

Q. What did you do, Mr. Caldwell, after you noticed the meter said 20 gallons?

A. I asked one of the crewmen if he would like to have some—if he would like to fuel his water tanks or fill his water tank.

Q. What was his answer?

A. He said yes, he would, so I passed them one of the water hoses from the dock right beside the gas hose and he put [354] it in the tank and went ahead and filled his water tank.

Q. While you were passing down the water hose the meter was within your view had you looked, at it, was it not?

Mr. Nave: I object to this, your Honor; it is all argumentative.

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: This is cross-examination.

The Court: I don't want any arguments. Objection overruled.

Mr. Vartan: I have forgotten the question. Would you read it?

(Record read.)

A. Yes, it was.

Q. (By Mr. Vartan): It was after you noticed that the meter read 20 gallons that you passed down the water hose, isn't that right?

A. It was about the same time.

Q. I see. Then how long did you figure it took to hand down the water hose—was there one water hose, by the way, or two?

A. This was the first one I gave him.

Q. All right. Then was there a second one you handed down?

A. I asked one of the crewmen if he thought he would use a lot of water, he says they might, so I gave them a second water hose.

Q. Mr. Caldwell, was the second water hose from the same [355] location as the first?

A. No, it wasn't, it was more to the south of the first one.

Q. How many feet, about?

A. It was to the south end of the gas landing.

Q. South end of the what?

A. The fuel dock, gasoline landing.

Q. Now, you have here C-2, Mr. Caldwell, the designation of the hose reel—I better put "Gas"

(Testimony of Charles Herbert Caldwell.)

under it, right? And then you said a moment ago that the water hose was close to the gasoline hose reel, is that right? A. That's right.

Q. You want to put an X where the water outlet was?

A. This is the first one right here. (Indicating.)

Q. Let's mark one at a time. C-4, what will we call that, water hose or water reel?

A. Water hose.

Q. Water hose. And then will you please put an X where the other water hose is. Now, will you please designate the other one.

A. The second hose came from this position right here.

Q. That will be C-5, water hose No. 2; right?

A. Right.

Q. About how many feet, Mr. Caldwell, separated the two water outlets, C-4 and C-5? [356]

A. Twenty-five, thirty feet.

Q. All right, you may sit down.

So that we get the thing in the proper order, when you saw the meter reading twenty gallons it was about the time you were passing the first water hose, right? A. Right.

Q. And then you walked 25 feet in order to pass the second water hose, is that right?

A. Right.

Q. And then you returned where?

A. I then returned to my office inside the sales shed and started heading my sales ticket.

Q. All right. Will you put an X where the door

(Testimony of Charles Herbert Caldwell.)

of your sales shed is? Is that where warehouse, where it is marked warehouse?

A. Yes, sir, this is the door here, this area here. (Indicating.)

Q. Is the area towards the gas line open or closed? A. Windows on both sides.

Q. And how large are those windows?

A. I really don't know.

Q. Well, from your office could you see the meter if you wanted to? A. Yes, I could.

Q. When you returned from the second water hose, which is [357] 25 feet away from the first water hose, and when you went into the sales shed, at that time did you look at the meter to ascertain what it was registering? A. No, sir.

Q. Mr. Caldwell, am I correct in saying that there was a fire extinguisher hanging on the wall on this gas dock near the meter? A. Yes, sir.

Q. Will you put an X where the fire extinguisher was hanging? A. (Witness marking.)

Mr. Vartan: C-6 for the record, will indicate where the fire extinguisher was hanging.

Q. (By Mr. Vartan): And will you describe the shape and color of that fire extinguisher for his Honor?

A. It was a red Ansul duo gas 30 pound fire extinguisher.

Q. What was its length?

A. About three feet.

Q. And what was its diameter?

(Testimony of Charles Herbert Caldwell.)

A. About 14 inches.

Q. This was a portable fire extinguisher, was it not?

A. Yes, sir.

Q. In your work for Union Oil Company had you been trained to reach for the fire extinguisher upon any actual or potential [358] danger? I mean, that follows, doesn't it?

A. No, sir. What is the danger you are trying to describe?

Q. Don't get mad at me, I am just asking you now was it part of your training with Union Oil if there is any potential danger of fire or anything else, to reach for the fire extinguisher; wasn't that part of your training?

A. Depending on the type of fire.

Q. Okay.

The Court: Was that fire extinguisher suitable for use, if you know, on an oil fire or gasoline fire?

The Witness: Yes, sir, it was. That would be the specific use of it. It would be of little use to a wood fire.

The Court: Was it packed under pressure?

The Witness: No, sir, it was a powder that has a CO2 cylinder that forces the powder out.

Q. (By Mr. Vartan): Mr. Caldwell, calling your attention to the diagram again, you have marked the meter—I will put gasoline meter here and we will mark that C-7, for the record, doesn't have a designation—and it is your testimony, is it, that you turned the flow of gas on, then you talked

(Testimony of Charles Herbert Caldwell.)

to Mr. Cardinale a minute or so, and then you handed down two water hoses, right?

A. Right.

Q. And when you handed down the first water hose you saw [359] that the meter then registered 30 gallons that had been delivered?

A. No, sir. I did not.

Q. Pardon me, 20 gallons. A. Yes.

Q. Is that true?

A. Approximately 20 gallons.

Q. All right, approximately 20. Then after you noticed that reading you walked 25 feet to the other water hose, which is marked C-5, handed down that hose and then walked back to your sales shed, which is at the corner as marked on the warehouse designation, is that true? A. Yes.

Q. And when you were in that sales shed you could see through windows the reading on that meter, couldn't you, if you had looked?

A. Yes.

Q. Did you look to see how much more than the 20 you had last read had been registered on the meter while you were at the last hose coming back?

A. No, I didn't.

Q. Okay. Mr. Caldwell, can you give us your best judgment as to how much time had elapsed from the time the flow of gasoline was turned on, by turning the valves, to a reading of the meter at 20 gallons by you? [360]

A. Approximately five or ten minutes.

Q. Will you tell us, please, with conditions or

(Testimony of Charles Herbert Caldwell.)

with the equipment you had there approximately how long it would have taken to deliver 30 gallons of gasoline?

A. Approximately ten minutes.

.Q. Wouldn't it be five to ten minutes to deliver 30 gallons with your equipment?

A. I don't know, sir, I never did time it. This is an approximation.

Q. The same deposition, page 23-A, line 14:

“Question: Well, you said that it was very slow. What did you have in mind?”

In the earlier questions, if counsel will concede, we were talking about the flow of gasoline.

“Answer: Well, I think it probably taken around five or ten minutes to put on thirty gallons. It depended a lot on how much gasoline there was in the tank that had an effect on the fluid height above it.”

Now, did you give that answer to that question?

A. Yes, sir, that's right.

Q. So it would take five to ten minutes, but it would depend on how much the fluid height of the storage gas tank was, isn't that right? [361]

A. That had an effect on it.

Q. It had an effect. When you were delivering or making this sale, Mr. Caldwell, had you advised Mr. Cardinale down below how high, what the height of the gasoline was in the storage tank?

A. No, sir.

Q. Had you told him how long it would probably take to fill 30 gallons? A. No, sir.

(Testimony of Charles Herbert Caldwell.)

Q. What was the capacity of the storage tank, the gasoline storage tank?

A. About 2,600 gallons. 2,600.

Q. How full was it, please, when this sale was being made? A. About two thirds.

Q. The greater the capacity in the storage tank, from your previous experience, the shorter the time it would take to deliver a given amount of gasoline, isn't that true? A. That's right.

Q. This was not a pump operated delivery, it was gravity flow, wasn't it? A. Yes, sir.

Q. When you looked at the meter the first time it was zero; the second time you saw the meter reading at 20, and you have already told us that—well, I will ask you again because I don't remember your exact figures, how much time [362] elapsed from the time you saw the meter at zero, opened the flow, and then when you saw it at 20 gallons?

A. I said approximately five or ten minutes.

Q. Five or ten minutes. When you walked to the second hose 25 feet away and walked back to the gas shed, how long did it take from the time you left the first water hose, and that's the time you saw it said 20 on the meter, walked to the second and came back to the gas shed, how much time elapsed? Your best judgment.

A. Well, I don't really know. I imagine it was fifteen or twenty minutes over all for the entire operation.

Q. All right. Now, you have told us you looked at the meter twice, once when it said zero, second

(Testimony of Charles Herbert Caldwell.)

when it said 20 gallons. Did you look at it a third time, Mr. Caldwell? A. Yes, sir.

Q. What was its reading, please?

A. After I had filled out my sales ticket?

Q. No, please, I don't want to interrupt you, but just answer the question. What was its reading when you saw it the third time?

A. In the neighborhood of 58 and one-half gallons.

Q. How much time had elapsed—strike that.

I will ask you, Mr. Caldwell, if it isn't a fact that before looking at the meter the third time Mr. Cardinale from the vessel yelled or shouted at you, "Haven't I got my [363] 30 gallons yet?"

A. No, sir, he did not.

Q. Well, did you advise him that more than 30 gallons had been delivered?

A. After I had noticed it was in the neighborhood of——

Mr. Nave: Your Honor please, I object to this type of cross-examination. I feel that once you ask what the conversation was this method of interrogation, I think, is improper and I object to it.

The Court: Overruled.

The witness has impressed me that he is a very truthful witness.

Mr. Vartan: Yes, your Honor.

The Court: Appears to me to be a very upstanding young man. I am very much impressed with his testimony. However, if you want to continue to examine him this way, continue to do so.

(Testimony of Charles Herbert Caldwell.)

Mr. Vartan: Well, I just want to get to the conversation.

The Court: You recall my suggestion that we start letting him tell his story in narrative form and then you might cross-examine him on that basis. However, you are well within your rights doing that, well within your rights doing that. You can continue this method of examination, but thus far I have been impressed with this man's [364] veracity.

Mr. Vartan: I am just trying to get the facts, your Honor, I am not trying to——

Q. (By Mr. Vartan): Well, give us the conversation after you noticed the third time that the meter said 58 and a half gallons. What did you do, what was said?

A. As a matter of courtesy——

The Court: Don't tell us about courtesy. What did you say?

The Witness: I said, "It looks like you will take sixty gallons."

Q. (By Mr. Vartan): And what did he say?

A. He didn't say anything to me.

The Court: Did he start cursing then or using the Lord's name?

The Witness: No, sir.

The Court: Now, was this ship a stranger to you? Had it come in there before?

The Witness: I had fueled her once before.

The Court: You recall how long ago that was?

(Testimony of Charles Herbert Caldwell.)

The Witness: Oh, it was at least two years before.

The Court: Do you recall how big the sale was at that time?

The Witness: I believe it was a diesel sale, [365] no gasoline was involved.

The Court: Were you familiar with this type of vessel?

The Witness: Not too much, no.

The Court: Were you familiar with its capacity for taking on gasoline and diesel oils?

The Witness: No, sir, I wouldn't be, they are all different.

The Court: You find that they are all different?

The Witness: Each one has their own capacity and their tanks, however they store it.

The Court: Well, now, for a vessel this size what would you say was the largest tank for gasoline that you have ever come across in these waters?

The Witness: Oh, it could be as much as a hundred gallons.

The Court: On an auxiliary engine?

The Witness: Depends on what he was fishing for. If he was fishing for albacore and had live bait tanked on he could have a larger gas capacity for more auxiliaries.

The Court: Did you know what type of fish this vessel was going after?

The Witness: Well, at that time Mr. Cardinale told me he was fishing for anchovies and sardines.

The Court: Go ahead, counsel. [366]

No. 15876

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant.

vs.

FRANCISCO L. PEDRASAZ,

Appellee.

Transcript of Record
(In Three Volumes)

FILED

MAY - 2 1958

Volume I
(Pages 1 to 29)

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

No. 15876

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant.

vs.

FRANCISCO L. PEDRASAZ,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 29)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Nave, Frederic G.	21
Answer to Libel, Union Oil Co.	10
Answer to Libel in Personam, Cardinale.	12
Attorneys, Names and Addresses of.	1
Certificate of Clerk to Record on Appeal.	23
Designation of Contents of Record on Appeal. .	25
Final Decree	17
Findings of Fact, Conclusions of Law and De- cision	16
Libel	3
Notice of Appeal.	19
Order Re Consolidation.	15
Order Extending Time.	22
Statement of Points on Appeal, Appellant's... .	26
Stipulation Extending Time to File Record and Docket Appeal.	19

Transcript of Proceedings	57
---------------------------------	----

Witnesses:

Adagio, Horace

—direct	123
—cross	143, 163

Belleci, Antoine

—direct	271
—cross	288, 295
—redirect	298

Byrne, Joseph

—direct	629
---------------	-----

Caldwell, Charles Herbert

—direct	335
—cross	386, 398, 403
—voir dire	393
—redirect	418, 422, 426
—recross	421, 423, 425, 428

Civello, Arthur A.

—direct	575, 588, 598
—cross	584, 593

Cox, Wilbur J.

—direct	468
—cross	476

Del Rio, Rudy

—direct	489
—cross	497, 502
—recross	506

INDEX

PAGE

Witness—(Continued)

Hansen, Irvin

—direct	649
—cross	673, 675

Hill, James Ewing

—direct	552
—cross	565
—redirect	570
—recross	571

Johnson, Lester

—direct	509
—cross	427
—redirect	571

Lopez, Francisco Pedrasaz

—direct	302
—cross	321, 332

Mason, David M.

—direct	429
—cross	448, 460

McMillan, James Boyce

—direct	533, 541
—cross	547

Ray, Garrett

—direct	173
—cross	187, 208

Romeo, Salvatore

—direct	250
—cross	258

INDEX

PAGE

Witness—(Continued)

Salmeri, Joe John

—direct	77
—cross	96, 114
—redirect	121
—recross	119, 122

Tarantino, Nino

—direct	214
—cross	231, 242
—redirect	243

Washburn, George

—direct	605
—cross	621

NAMES AND ADDRESSES OF ATTORNEYS

RUSSELL ZACHES,

316 Professional Bldg.,

Monterey, California;

SAMUEL VARTAN,

1020 Russ Bldg.,

San Francisco 4, California;

MICHELSON, WHELAN AND MICHELSON,

1650 Russ Bldg.,

San Francisco 4, California,

Proctors for Libelant & Appellee.

FREDERIC G. NAVE,

BOYD & TAYLOR,

350 Sansome St.,

San Francisco, California,

Proctors for Respondent & Appellant.

In the District Court of the United States in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty No. 27119

FRANCISCO L. PEDRASAZ,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation; FRANCES E. CARDINALE,
Administratrix of the Estate of FRANK JO-
SEPH CARDINALE, Also Known as FRANK
J. CARDINALE, Deceased; IDALINE JEN-
NER CARDINALE; BLACK COMPANY, a
Corporation; WHITE COMPANY, a Cor-
poration; JOHN DOE; RICHARD ROE and
PETER ROE,

Respondents.

LIBEL

(Damages for Personal Injuries—\$100,000.00)

To the Honorable Judges of the Above-Entitled
Court:

The libel of Francisco L. Pedrasaz, in a case of
libel, civil and maritime, for damages for personal
injuries, alleges as follows:

I.

That the respondent Union Oil Company of Cali-
fornia is now and was at all times herein mentioned
a corporation duly organized and existing under

and by virtue of the laws of the State of California and authorized to do and doing business in the City and County of San Francisco, State and Northern District of California.

II.

That the respondents, Black Company, a corporation, and White Company, a corporation, are now and were at all times mentioned herein corporations duly organized and existing under and by virtue of the laws of one of the States of the United States and were at all of said times authorized to do and doing business in said City and County of San Francisco, State and Northern District of California.

III.

That the true names of respondents, Black Company, a corporation; White Company, a corporation; John Doe; Richard Roe; and Peter Roe, are unknown to libelant and for that reason said respondents are sued herein under fictitious names. Libelant prays that when the true names of said respondents are ascertained they be substituted herein in the place and stead of said fictitious names.

IV.

That on or about the 28th day of September, 1954, Frank Joseph Cardinale, also known as Frank J. Cardinale, died; that thereafter to wit, on the 12th day of November, 1954, after proceedings duly had for such purpose, Respondent Frances E. Cardinale was duly appointed administratrix of the estate of Frank Joseph Cardinale, also known as

Frank J. Cardinale, Deceased, by the Superior Court of the State of California, in and for the County of Monterey and on said 12th day of November, 1954, qualified as such administratrix and entered upon the administration of said estate and ever since such time has been and now is the duly appointed, qualified and acting administratrix of the estate of said deceased. That said Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, will hereinafter be referred to as "Decedent."

V.

That at all times on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, and for a long time prior thereto, said Decedent and Respondent Idaline Jenner Cardinale owned, operated, managed, controlled, navigated and maintained the fishing vessel Santa Lucia, which vessel was at all of said times a vessel of the American Merchant Marine, employed as a commercial fishing vessel.

VI.

That at all times on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, libelant was employed by said Decedent and Respondent Idaline Jenner Cardinale, to work as a seaman, to wit, as a fisherman on board, and as a member of the crew of said vessel, Santa Lucia, and was working on board said vessel in the course and scope of his said employ-

ment; that during all of said times said vessel was afloat on navigable waters.

VII.

That on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged and for a long time prior thereto, Respondent Union Oil Company of California, a corporation, owned, maintained, managed, operated and controlled, on piers and land at Avila, California, a commercial marine service and fueling station, gasoline, oil and other petroleum products, tanks and other facilities for the storage of said gasoline, oil and other petroleum products, and equipment for use in connection with said commercial marine service and fueling station, gasoline, oil, other petroleum products, tanks and other facilities.

VIII.

That on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, and while said vessel was moored at one of said piers in connection with the fueling of said vessel by Respondent Union Oil Company of California, a corporation, and said commercial marine service and fueling station, said Decedent and Respondents herein, except respondent administratrix, negligently caused and permitted an explosion and fire to occur in, on, around and about said vessel, whereby libelant was made weak, sick, sore, lame, stiff and disabled and caused to suffer a fracture of his right wrist and arm, a fracture of the

right tibia, burns of the right wrist and arm, contusions, bruises, strains and sprains of his right hand, wrist, shoulder, right leg, ankle and foot and other parts of his body and great nervous shock; that because of said injuries libelant ever since receiving the same, has been and always will be weak, sick, sore, lame, stiff, disabled and deformed; that the aforesaid negligence of Decedent and respondents herein, except respondent administratrix, directly and proximately caused libelant to be injured as aforesaid and Decedent and respondents herein, except respondent administratrix, did negligently cause and permit libelant to be so injured.

IX.

That because of said injuries, libelant has suffered ever since receiving the same and always will suffer great physical and mental pain and anguish.

X.

That immediately prior to being injured as aforesaid, libelant was in good physical and mental condition and earning or capable of earning at his occupation of seaman approximately \$350.00 per month, together with his board and lodging of the reasonable value of \$240.00 per month, but because of said injuries, libelant has been unable to work or earn any money since the said 28th day of September, 1954, will be unable to work or earn money for a long period of time to come, and thereafter will only be able to work and earn money at great financial loss.

XI.

That because of said injuries and the aforesaid negligence of Decedent and respondents herein, except respondent administratrix, libelant necessarily incurred reasonable hospital and other medical bills in a reasonable sum presently unknown to libelant and libelant in the future will necessarily incur further and additional reasonable expenses for hospital and other medical expenses in an amount not as yet known to libelant, and as to which libelant prays leave to amend this libel and produce proof thereof at the time of trial.

XII.

That by reason of the premises, libelant has been damaged in the sum of \$100,000.00, which amount libelant asks be awarded to him by this Court:

XIII.

That libelant's aforesaid claim in respect to damages for personal injuries was heretofore and within the time prescribed for the filing of creditor's claims by the provisions of the Probate Code of California and the Notice to Creditors published by Respondent Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, duly and regularly presented to the said estate as directed in said Notice to Creditors, and said claim has been rejected and disallowed.

XIV.

That all and singular the premises are true and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process, according to the courses of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the respondents and each of them and that respondents and each of them may be cited to appear and answer, all and singular, the matters aforesaid and that this Honorable Court would be pleased to decree to the libelant the sum asked for by the libelant in the aforesaid libel and for costs and for such other and further relief as in law and justice libelant is entitled to receive.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Proctors for Libelant.

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

Francisco L. Pedrasaz, being first duly sworn, deposes and says:

That he is the libelant named in the above-entitled cause; that he has read the within and foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and

belief, and as to those matters that he believes it to be true.

/s/ FRANCISCO L. PEDRASAZ.

Subscribed and sworn to before me this 2nd day of May, 1955.

[Seal] /s/ ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

No. 27119

ANSWER TO LIBEL

Comes Now the Respondent, Union Oil Company of California, a corporation, and answering Libellant's Libel on file herein admits, denies and alleges as follows:

I.

Answering Paragraphs IV, VI, VII, IX, X and XIII, said respondent alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground denies each and every, all and singular, the allegations therein contained and each and every part thereof.

II.

Answering Paragraphs VIII and XI, denies each and every, all and singular, the allegations therein

contained and each and every part thereof insofar as the same names, mentions or concerns this answering respondent.

III.

Answering Paragraphs XII and XIV, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that Libelant, Francisco L. Pedrasaz has been damaged in the sum of \$100,000.00 or any other sum or sums whatsoever or at all.

Further answering said Libel, and as and for a separate and distinct defense thereto and plea of contributory negligence, said respondent alleges that Libelant, Francisco L. Pedrasaz, was negligent and careless in and about the matters set forth in said Libel in the following manner, to wit: that at the said time and place Libelant, Francisco L. Pedrasaz, failed to use due or any care or caution for the protection of his own safety; that said acts of carelessness and negligence on his part proximately caused or contributed to the damage sustained or injury sustained.

Wherefore, said respondent prays that Libelant take nothing by his action and that said respondent be hence dismissed with its costs herein incurred.

BOYD & TAYLOR,

/s/ FREDERIC G. NAVE,

Proctors for Respondent, Union Oil Company of California, a Corporation.

State of California,
City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says: That he is one of the proctors for respondent herein; that he has read the foregoing Answer to Libel and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of June, 1955.

[Seal] /s/ VIRGINIA RUTH HOLLOWAY,
Notary Public in and for the City and County of
San Francisco, State of California.
My Commission expires Aug. 11, 1956.

[Endorsed]: Filed June 13, 1955.
Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

No. 27119

ANSWER TO LIBEL IN PERSONAM

To the Honorable Judges of the Above-Entitled
Court:

Frances E. Cardinale, administratrix of the
Estate of Frank Joseph Cardinale, also known as

Frank J. Cardinale, deceased, and Idaline Jenner Cardinale answer the Libel filed herein, admitting, denying and alleging as follows:

I.

Answering Paragraphs II, III, VII, IX, X and XI of libelant's Libel, respondents allege that they have no information or belief sufficient to enable them to answer the allegations therein contained, and, placing their denial on that ground, deny each and every, all and singular, the allegations therein contained.

II.

Answering Paragraphs V, VI, VII and XII of said Libel, respondents deny each and every, all and singular, the allegations therein contained.

Deny that libelant Francisco L. Pedrasaz has been damaged in the sum of \$100,000.00, or any other sum or sums whatever, or at all.

Wherefore, respondents Frances E. Cardinale and Idaline Jenner Cardinale pray that libelant take nothing by his action and that said respondents be dismissed with their costs herein incurred.

/s/ MORTON L. SILVERS,

MORGAN & BEAUZAY,

Proctors for Respondents Frances E. Cardinale and
Idaline Jenner Cardinale.

State of California,

City and County of San Francisco—ss.

Frances E. Cardinale, being first duly sworn, deposes and says:

That she is one of the respondents in the above action; that she has read the foregoing Answer to Libel in Personam, and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

/s/ FRANCES E. CARDINALE.

Subscribed and sworn to before me this 1st day of October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 18, 1958.

State of California,

City and County of San Francisco—ss.

Idaline Jenner Cardinale, being first duly sworn, deposes and says:

That she is one of the respondents in the above action; that she has read the foregoing Answer to Libel in Personam, and knows the contents thereof; that the same is true of her own knowledge, except

as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

/s/ IDALINE JENNER CARDINALE.

Subscribed and sworn to before me this 1st day of October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 18, 1958.

[Endorsed]: Filed Oct. 4, 1955.

Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

MINUTE ORDER RE CONSOLIDATION
OF CASES

(August 5, 1957)

Present: The Honorable Louis E. Goodman,
District Judge.

27116—Salmeri vs. Cardinale.

27117—Salmeri vs. Union Oil Co. of Calif.

27118—Pedrasaz vs. Cardinale.

27119—Pedrasaz vs. Union Oil Co. of Calif.

27120—Tarantino vs. Cardinale.

27121—Tarantino vs. Union Oil Co. of Calif.

27122—Belleci vs. Cardinale.

27123—Belleci vs. Union Oil Co. of Calif.

27124—Belleci vs. Cardinale.

27125—Belleci vs. Union Oil Co. of Calif.

27156—J. Romeo vs. Union Oil Co. of Calif.

27157—S. Romeo vs. Union Oil Co. of Calif.

27158—Cardinale vs. Union Oil Co. of Calif.

27159—Adagio vs. Union Oil Co. of Calif.

The above-entitled cases came on regularly this day to be set for trial. On motion of John Whelan, Esq., Ordered all of these cases and case No. 27364—Cardinale vs. Union Oil Company, be consolidated and trial set for August 26, 1957.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND DECISION OF THE COURT

(Reporter's Transcript—Sept. 12, 1957)

[See Volume I, Pages 17 to 43, Case No. 15875,
Joseph Salmeri vs. Union Oil Co., etc.]

In the District Court of the United States, and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty No. 27118 and No. 27119
(Consolidated)

FRANCISCO L. PEDRASAZ,

Libelant,

vs.

FRANCES E. CARDINALE, Administratrix of
the Estate of FRANK JOSEPH CARDINALE,
Also Known as FRANK J. CARDINALE, De-
ceased, IDALINE JENNER CARDINALE,
et al.,

Respondents.

FRANSICO L. PEDRASAZ,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, FRANCES E. CARDINALE, Ad-
ministratrix of the Estate of FRANK JOSEPH
CARDINALE, Also Known as FRANK J.
CARDNIALE, Deceased, IDALINE JENNER
CARDINALE, et al.,

Respondents.

FINAL DECREE

The above-entitled cases having come on regularly
to be heard on the 3rd, 4th, 5th, 6th, 9th, 10th, 11th
and 12th days of September, 1957, and the court
having considered the evidence, both oral and docu-
mentary, and the arguments of counsel and the cause
having been submitted and the court having made

It Is Ordered, Adjudged and Decreed that libelant, Francisco L. Pedrasaz, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, the total sum of \$14,167.37.

It Is Further Ordered, Adjudged and Decreed that libelant, Francisco L. Pedrasaz, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, his costs involved herein.

Dated: October 4th, 1957.

and entered its Findings of Fact and Conclusions of Law, Now, Therefore,

/s/ SYLVESTER J. RYAN,
United States District Judge.

Approved as to Form and receipt of copy of the above and foregoing Final Decree is hereby acknowledged this 27th day of September, 1957.

BOYD & TAYLOR,
By /s/ FREDERIC G. NAVE,
/s/ MORTON L. SILVERS,
/s/ MORGAN & BEAUZAY,
Proctors for Respondents.

[Endorsed]: Filed Oct. 10, 1957.

[Title of District Court and Cause.]

No. 27119

NOTICE OF APPEAL

Notice Is Hereby Given that Union Oil Company of California, a corporation, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 11, 1957.

Dated: November 6th, 1957.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Attorneys for Appellant, Union Oil Company of
California, a Corporation.

[Endorsed]: Filed Nov. 7, 1957.

[Title of District Court and Cause.]

No. 27119

STIPULATION EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It Is Hereby Stipulated and Agreed, by and between the attorneys for the parties hereto, subject to the order of the court, that the time within which

respondent-appellant shall file the record on appeal and docket the appeal from judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including January 13, 1958.

Dated: December 12, 1957.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Attorneys for Libelant Fran-
cisco Pedrasaz.

FREDERIC G. NAVE,
BOYD & TAYLOR,

/s/ FREDERIC G. NAVE,
Attorneys for Respondent-Appellant Union Oil
Company of California, a Corporation.

So Ordered: December 12, 1957.

/s/ GEO. B. HARRIS,

United States District Judge.

[Endorsed]: Filed Dec. 16, 1957.

[Title of District Court and Cause.]

No. 27119

AFFIDAVIT OF FREDERIC G. NAVE

State of California,

City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says:

That he is an attorney and proctor of law duly licensed and admitted in the above-entitled court and is the proctor attorney for the appellant, Union Oil Company of California, a corporation, and makes this Affidavit for and on behalf of said appellant, Union Oil Company of California, a corporation; that heretofore on December 12, 1957, pursuant to stipulation and order of this court the time within which the Appellant, Union Oil Company of California, a corporation, should file its record on appeal and docket the appeal from the judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit was extended to and including January 13, 1958; that affiant has consulted with the reporters who are preparing the record and transcripts and has been advised that due to the press of work that the record and transcript is not yet completed and have requested an extension of time of thirty (30) days for such purposes; that affiant did communicate with attorney, John Whelan, of the law firm of Michelson, Whelan & Michelson, of San Fran-

cisco, who are the proctors and attorneys for the Libelant, Appellee, and did request the written stipulation consenting to such extension and was advised that while they would not grant a stipulation in writing that they had no objection to a court order granting such extension being entered.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of January, 1958.

[Seal] /s/ VIRGINIA A. HAMILTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 2, 1960.

[Endorsed]: Filed Jan. 13, 1958.

[Title of District Court and Cause.]

No. 27119

ORDER EXTENDING TIME

Upon reading the Affidavit of Frederic G. Nave, Proctor for Respondent and Appellant, Union Oil Company of California, a corporation, and for good cause appearing;

It Is Hereby Ordered that the time within which the Respondent, Appellant, Union Oil Company of California, a corporation, shall file the record or appeal and docket the appeal from the judgment

entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including February 12, 1958.

Dated: January 13, 1958.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed Jan. 13, 1958.

[Title of District Court and Cause.]

Nos. 27118 and 27119

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein:

Libel (Damages for Personal Injuries — \$100,000.000).

Answer to Libel.

Libel in Personam.

Deposition of Francisco L. Pedrasaz.

Minute Order dated August 5, 1957, consolidating cases for trial.

Final Decree.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Stipulation Extending Time to File Record and Docket Appeal.

Affidavit of Frederic G. Nave.

Order Extending Time.

Libelant's Exhibits 1 to 12, inclusive.

Respondents' Exhibits A to W, inclusive.

(Exhibits placed in file 27117).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of January, A.D. 1958.

C. W. CALBREATH,
Clerk,

By /s/ WM. J. FLINN ,
Deputy Clerk.

[Endorsed]: No. 15876. United States Court of Appeals for the Ninth Circuit. Union Oil Company of California, a Corporation, Appellant, vs. Francisco L. Pedrasaz, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 16, 1958.

Docketed: February 5, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15876

FRANCISCO L. PEDRASAZ,

Libelant and Appellee,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents and Appellants.

DESIGNATION OF THE CONTENTS
OF RECORD ON APPEAL

Appellant, Union Oil Company of California, a corporation, designates the entire record pursuant to Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, including the Reporter's Transcript and all exhibits.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR;

By /s/ FREDERIC G. NAVE,
Proctors for Appellant, Union Oil Company of
California, a Corporation.

[Endorsed]: Filed Feb. 5, 1958.

[Title of Court of Appeals and Cause.]

No. 15876

APPELLANT'S STATEMENT
OF POINTS ON APPEAL

Appellant, Union Oil Company of California, a corporation, hereby submits its concise statement of points upon which appellant intends to rely in this appeal as follows:

1. The Court erred in finding that the injuries sustained by the libelant were caused or occasioned by negligence of appellant proximately causing or contributing to the explosion of the F/V Santa Lucia.

2. The Court erred in finding that the injuries sustained by the libelant occurred because of fault or negligence on the part of this respondent.

3. The Court erred in not finding that the sole cause of the injuries to the libelant was due to the unseaworthiness of the F/V Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the F/V Santa Lucia.

4. The Court erred in finding that Charles Caldwell, the marine service station employee of appellant, was guilty of negligence contributing to the explosion and fire aboard the F/V Santa Lucia.

5. The Court erred in finding that respondent was guilty of negligence as a joint tortfeasor in this action.

6. The Court erred in finding that the appellant, Union Oil Company of California, was at fault and to blame for the injuries received by the libelant.

7. The Court erred in finding that the respondent, Union Oil Company of California, was jointly at fault and to blame with the co-owners, Frances E. Cardinale, administratrix of the estate of Frank J. Cardinale, and Idaline Jenner Cardinale, the co-owners of the F/V Santa Lucia.

8. The Court erred in failing to find, as a conclusion of law, that the appellant, Union Oil Company of California, was not negligent in any manner contributing to the explosion and fire of the F/V Santa Lucia and resulting injuries to libelant.

9. The Court erred in making findings of fact that Charles Caldwell, an employee of respondent, Union Oil Company of California, was negligent and at fault when he failed to look at the gasoline meter until 58½ gallons had been delivered to the F/V Santa Lucia.

10. The Court erred in its findings of fact that the failure of the said Charles Caldwell, an employee of the Union Oil Company of California, to look at the gasoline meter until 58½ gallons had been delivered, was negligence contributing to or causing the explosion and fire aboard the F/V Santa Lucia and resulting injuries to libelant.

11. The Court erred in making and entering the findings of fact that the respondent, Union Oil

Company of California, was negligent and at fault in not exercising reasonable care or prudence and that its failure so to do was a proximate cause of the explosion, and fire on the F/V Santa Lucia and the resulting injuries to libelant.

12. The Court erred in that the findings of fact heretofore mentioned are not supported by any evidence in the trial of said action.

13. The Court erred in that there was no evidence to support its findings of negligence against the said Caldwell or this appellant heretofore specifically mentioned.

14. The Court erred in adopting conclusions of law inconsistent with its findings of facts.

15. The Court properly concluded that the explosion aboard the F/V Santa Lucia was due to an unseaworthiness aboard the Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the ship, but conclusions of law holding appellant, Union Oil Company of California, to be a joint tort feisor was inconsistent therein.

16. The Court erred in awarding judgment in favor of libelant against this appellant.

17. The Court erred in allowing excessive damages against this appellant.

18. That the amount of damages awarded libelant against this appellant included maintenance and

cure which, under the evidence of this case, should not have been awarded against appellant.

19. That the money judgment awarded appellant was excessive and was not supported by the evidence in this case.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR;

/s/ FREDERIC G. NAVE,
Proctors for Appellant, Union
Oil Company of California.

[Endorsed]: Filed Feb. 5, 1958.

No. 15877

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant,

vs.

ANTOINE BELLECI,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 29)

FILED

MAY - 2 1958

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

No. 15878

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant,

vs.

ANTOINE BELLECI, Administrator of the Estate
of JACQUES CARDINALE, Deceased,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 29)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of Nave, Frederic G.	21
Answer to Libel, Union Oil Co.	10
Answer to Libel, Cardinale.	13
Attorneys, Names and Addresses of.	1
Certificate of Clerk to Record on Appeal.	23
Designation of Contents of Record on Appeal. .	29
Final Decree	17
Findings of Fact, Conclusions of Law and Decision	16
Libel	3
Notice of Appeal.	19
Order Re Consolidation.	16
Order Extending Time.	22
Statement of Points on Appeal, Appellant's... ..	29
Stipulation Extending Time to File Record and Docket Appeal.	20

INDEX	PAGE
Transcript of Proceedings	57
Witnesses:	
Adagio, Horace	
—direct	123
—cross	143, 163
Belleci, Antoine	
—direct	271
—cross	288, 295
—redirect	298
Byrne, Joseph	
—direct	629
Caldwell, Charles Herbert	
—direct	335
—cross	386, 398, 403
—voir dire	393
—redirect	418, 422, 426
—recross	421, 423, 425, 428
Civello, Arthur A.	
—direct	575, 588, 598
—cross	584, 593
Cox, Wilbur J.	
—direct	468
—cross	476
Del Rio, Rudy	
—direct	489
—cross	497, 502
—recross	506

INDEX

PAGE

Witness—(Continued)

Hansen, Irvin

—direct 649

—cross 673, 675

Hill, James Ewing

—direct 552

—cross 565

—redirect 570

—recross 571

Johnson, Lester

—direct 509

—cross 427

—redirect 571

Lopez, Francisco Pedrasaz

—direct 302

—cross 321, 332

Mason, David M.

—direct 429

—cross 448, 460

McMillan, James Boyce

—direct 533, 541

—cross 547

Ray, Garrett

—direct 173

—cross 187, 208

Romeo, Salvatore

—direct 250

—cross 258

INDEX

PAGE

Witness—(Continued)

Salmeri, Joe John

—direct	77
—cross	96, 114
—redirect	121
—recross	119, 122

Tarantino, Nino

—direct	214
—cross	231, 242
—redirect	243

Washburn, George

—direct	605
—cross	621

NAMES AND ADDRESSES OF ATTORNEYS

RUSSELL ZACHES,
316 Professional Bldg.,
Monterey, California;

SAMUEL VARTAN,
1020 Russ Bldg.,
San Francisco 4, California;

MICHELSON, WHELAN AND MICHELSON,
1650 Russ Bldg.,
San Francisco 4, California,

Proctors for Libelant and Appellee.

FREDERIC G. NAVE,
BOYD & TAYLOR,
350 Sansome St.,
San Francisco, California,

Proctors for Respondent and Appellant.

In the District Court of the United States in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty No. 27125

ANTOINE BELLECI, Administrator of the Estate
of JACQUES CARDINALE, Deceased,

Libelant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation; FRANCES E. CARDINALE,
Administratrix of the Estate of FRANK
JOSEPH CARDINALE, Also Known as
FRANK J. CARDINALE, Deceased; IDA-
LINE JENNER CARDINALE; BLACK
COMPANY, a Corporation; JOHN DOE,
RICHARD ROE and PETER ROE,

Respondents.

LIBEL

(Damages for Wrongful Death—\$150,000.00)

To the Honorable Judges of the Above-Entitled
Court:

The libel of Antoine Belleci, Administrator of
the Estate of Jacques Cardinale, Deceased, in a
case of libel, civil and maritime, for damages for
wrongful death, alleges as follows:

I.

That on or about the 28th day of September, 1954,
Jacques Cardinale died, that thereafter, to wit, on

the 8th day of April, 1955, after proceedings duly had for such purpose, Antoine Belleci was duly appointed Administrator of the Estate of Jacques Cardinale, Deceased, by the Superior Court of the State of California, in and for the County of Monterey, and on said 8th day of April, 1955, qualified as such Administrator and entered upon the administration of said estate and ever since such time has been and now is the duly appointed, qualified and acting Administrator of the Estate of said Deceased.

II.

That the respondent, Union Oil Company of California, is now and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and authorized to do and doing business in the City and County of San Francisco, State and Northern District of California.

III.

That the respondents, Black Company, a corporation, and White Company, a corporation, are now and were at all times mentioned herein corporations duly organized and existing under and be virtue of the laws of one of the States of the United States and were at all of said times authorized to do and doing business in said City and County of San Francisco, State and Northern District of California.

IV.

That the true names of respondents. Black Company, a corporation; White Company, a corpora-

tion; John Doe, Richard Roe and Peter Roe, are unknown to libelant and for that reason said respondents are sued herein under fictitious names. Libelant prays that when the true names of said respondents are ascertained they be substituted herein the place and stead of said fictitious names.

V.

That on or about the 28th day of September, 1954, Frank Joseph Cardinale, also known as Frank J. Cardinale, died; that thereafter, to wit, on the 12th day of November, 1954, after proceedings duly had for such purpose, respondent Frances E. Cardinale was duly appointed administratrix of the estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, by the Superior Court of the State of California, in and for the County of Monterey and on said 12th day of November, 1954, qualified as such administratrix and entered upon the administration of said estate and ever since such time has been and now is the duly appointed, qualified and acting administratrix of the estate of said Deceased. That said Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, will hereinafter be referred to as "Decedent."

VI.

That at all times on or about the 28th day of September, 1954, and at the time Jacques Cardinale was injured and died as hereinafter alleged, and for a long time prior thereto, said Decedent and respondent Idaline Jenner Cardinale owned, oper-

ated, managed, controlled, navigated and maintained the fishing vessel Santa Lucia, which vessel was at all of said times a vessel of the American Merchant Marine, employed as a commercial fishing vessel.

VII.

That at all times on or about the 28th day of September, 1954, and at the time Jacques Cardinale was injured and died as hereinafter alleged, said Jacques Cardinale was employed by said Decedent and respondent, Idaline Jenner Cardinale, to work as a seaman, to wit, as a fisherman on board, and as a member of the crew of, said vessel Santa Lucia, and was working on board said vessel in the course and scope of his said employment; that during all of said times said vessel was afloat on navigable waters.

VIII.

That on or about the 28th day of September, 1954, and at the time Jacques Cardinale was injured and died as hereinafter alleged and for a long time prior thereto, respondent Union Oil Company of California, a corporation, owned, maintained, managed, operated and controlled, on piers and land at Avila, California, a commercial marine service and fueling station, gasoline, oil and other petroleum products, tanks and other facilities for the storage of said gasoline, oil and other petroleum products, and equipment for use in connection with said commercial marine service and fueling station, gasoline, oil, other petroleum products, tanks and other facilities.

IX.

That on or about the 28th day of September, 1954, and at the time Jacques Cardinale was injured and died as hereinafter alleged, and while said vessel was moored at one of said piers in connection with the fueling of said vessel by respondent Union Oil Company of California, a corporation, and said commercial marine service and fueling station, said Decedent and respondents herein, except respondent administratrix, negligently caused and permitted an explosion and fire to occur in, on, around and about said vessel, whereby Jacques Cardinale was caused to be critically and fatally injured and from and because of said injuries said Jacques Cardinale died on said vessel on or about said 28th day of September, 1954; that the aforesaid negligence of Decedent and respondents herein, except respondent administratrix, directly and proximately caused Jacques Cardinale to be critically and fatally injured and to die as aforesaid and Decedent and respondents herein, except respondent administratrix, did negligently cause and permit Jacques Cardinale to be so critically and fatally injured and to die as aforesaid.

X.

That at the time Jacques Cardinale was injured and died as aforesaid, he was forty-seven years of age, in excellent physical and mental condition and bodily vigor and earning or capable of earning at his occupation of seaman approximately \$350.00 per month, together with his board and lodging of the reasonable value of \$240.00 per month.

XI.

That said Jacques Cardinale left surviving him, his widow, Marie Cardinale, and two minor children, Francine Cardinale and Vincent Cardinale, the exact ages of said widow and children being presently unknown to libelant, and as to which libelant prays leave to amend this libel and produce proof thereof at the time of trial. That this libel is brought for and on behalf of and for the benefit of said widow and minor children.

XII.

That said widow and minor children of said Jacques Cardinale were dependent upon and did receive from said Jacques Cardinale their maintenance and support, and that by reason of his death, as aforesaid, said widow and minor children ever since his death have been and for the rest of their lives will be deprived of such maintenance and support.

XIII.

That by reason of the premises, said widow and minor children have been damaged in the sum of \$150,000.00, which sum libelant asks this court to award him for the benefit of said widow and minor children.

XIV.

That claim in respect to said damages for the wrongful death of said Jacques Cardinale was heretofore and within the time prescribed for the filing of creditor's claims by the provisions of the Probate Code of California and the Notice to Creditors pub-

lished by respondent Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, duly and regularly presented to the said Estate as directed in said Notice to Creditors, and said claim has been rejected and disallowed.

XV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process, according to the courses of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the respondents and each of them and that respondents and each of them may be cited to appear and answer, all and singular, the matters aforesaid and that this Honorable Court would be pleased to decree to the libelant the sum asked for by the libelant in the aforesaid libel and for costs and for such other and further relief as in law and justice libelant is entitled to receive.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Proctors for Libelant.

United States of America,
State and Northern District of California,
County of Monterey—ss.

Antoine Belleci, being first duly sworn, deposes and says:

That he is the duly appointed, qualified and acting Administrator of the Estate of Jacques Cardinale, Deceased, and the libelant named in the above-entitled cause; that he has read the within and foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ ANTOINE BELLECI.

Subscribed and sworn to before me this 2nd day of May, 1955.

[Seal] /s/ EDNA MASON,
Notary Public in and for the County of Monterey,
State of California.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

· No. 27125

ANSWER TO LIBEL

Comes now the Respondent, Union Oil Company of California, a corporation, and answering Libel-

ant's Libel on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs I, V, VI, VII, VIII, XII and XIV, said respondent alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

II.

Answering Paragraph X, denies each and every, all and singular, the allegations therein contained and each and every part thereof insofar as the same names, mentions or concerns this answering respondent.

III.

Answering Paragraphs XIII and XV, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that Libelant, Antoine Belleci, Administrator of the Estate of Jacques Cardinale, Deceased, has been damaged in the sum of \$150,000.00 or any other sum or sums whatsoever or at all.

Further answering said Libel, and as and for a separate and distinct defense thereto and plea of contributory negligence, said respondent alleges that the decedent, Jacques Cardinale, was negligent and careless in and about the matters set forth in said Libel in the following manner, to wit: That at the

said time and place said decedent, Jacques Cardinale, failed to use due or any care or caution for the protection of his own safety; that said acts of carelessness and negligence on his part proximately caused or contributed to the damage sustained or injury sustained; that said acts of carelessness and negligence of the said decedent, Jacques Cardinale, are imputed to Antoine Belleci, Administrator of the Estate of Jacques Cardinale, Deceased.

Wherefore, said respondent prays that Libelant take nothing by his action and that said respondent be hence dismissed with its costs herein incurred.

BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Respondent, Union Oil Company of
California, a Corporation.

State of California,
City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says: That he is one of the proctors for respondent herein; that he has read the foregoing Answer to Libel and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of June, 1955.

[Seal] /s/ GINA MATTEUCCI,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires August 20, 1957.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

No. 27125

ANSWER TO LIBEL FOR DAMAGES
FOR WRONGFUL DEATH

To the Honorable Judges of the Above-Entitled
Court:

Frances E. Cardinale, administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, deceased, and Idaline Jenner Cardinale answer the libel filed herein, admitting, denying and alleging as follows:

I.

Answering paragraphs I, III, IV, VIII, X, XI and XII of libelant's Libel, respondents allege that they have no information or belief sufficient to enable them to answer the allegations therein contained, and, placing their denial on that ground, deny each and every, all and singular, the allegations therein contained.

Answering paragraphs VI, VII and IX of said Libel, respondents deny each and every, all and singular, the allegations therein contained.

Deny that the widow and two minor children of said Jacques Cardinale have been damaged in the sum of \$150,000.00, or any other sum or sums whatever, or at all.

Wherefore, respondents Frances E. Cardinale and Idaline Jenner Cardinale pray that libelant take nothing by his action and that said respondents be dismissed with their costs herein incurred.

/s/ MORTON L. SILVERS,
MORGAN & BEAUZAY,
Proctors for Respondents Frances E. Cardinale and
Idaline Jenner Cardinale.

State of California,
City and County of San Francisco—ss.

Frances E. Cardinale, being first duly sworn, deposes and says:

That she is one of the respondents in the above action; that she has read the foregoing Answer to Libel for Damages for Wrongful Death, and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

/s/ FRANCES E. CARDINALE.

Subscribed and sworn to before me this 1st day of October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 18, 1958.

State of California,
City and County of San Francisco—ss.

Idaline Jenner Cardinale, being first duly sworn,
deposes and says:

That she is one of the respondents in the above
action; that she has read the foregoing Answer to
Libel for Damages for Wrongful Death, and knows
the contents thereof; that the same is true of her
own knowledge, except as to the matters which are
therein stated on her information or belief and as
to those matters that she believes it to be true.

/s/ IDALINE JENNER CARDINALE.

Subscribed and sworn to before me this 1st day
of October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 18, 1958.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 4, 1955.

[Title of District Court and Cause.]

MINUTE ORDER RE CONSOLIDATION
OF CASES

Present: The Honorable Louis E. Goodman,
District Judge.

- 27116—Salmeri vs. Cardinale;
- 27117—Salmeri vs. Union Oil Co. of Calif.;
- 27118—Pedrasaz vs. Cardinale;
- 27119—Pedrasaz vs. Union Oil Co. of Calif.;
- 27120—Tarantino vs. Cardinale;
- 27121—Tarantino vs. Union Oil Co. of Calif.;
- 27122—Belleci vs. Cardinale;
- 27123—Belleci vs. Union Oil Co. of Calif.;
- 27124—Belleci vs. Cardinale;
- 27125—Belleci vs. Union Oil Co. of Calif.;
- 27156—J. Romeo vs. Union Oil Co. of Calif.;
- 27157—S. Romeo vs. Union Oil Co. of Calif.;
- 27158—Cardinale vs. Union Oil Co. of Calif.;
- 27159—Adagio vs. Union Oil Co. of Calif.

The above-entitled cases came on regularly this day to be set for trial. On motion of John Whelan, Esq., Ordered all of these cases and case No. 27364—Cardinale vs. Union Oil Company—be consolidated and trial set for August 26, 1957.

FINDINGS OF FACTS, CONCLUSIONS OF
LAW AND DECISION OF THE COURT

(Reporters Transcript—Sept. 12, 1957)

[See Volume I, Pages 17 to 43, Case No. 15875,
Joseph Salmeri vs. Union Oil Co., etc.]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty, Nos. 27124 and 27125
(Consolidated)

ANTOINE BELLECI, Administrator of the Estate
of JACQUES CARDINALE, Deceased,

Libellant,

vs.

FRANCES E. CARDINALE, Administratrix of
the Estate of FRANK JOSEPH CARDI-
NALE, Also Known as FRANK J. CARDI-
NALE, Deceased; IDALINE JENNER CAR-
DINALE, et al.,

Respondents.

ANTOINE BELLECI, Administrator of the Estate
of JACQUES CARDINALE, Deceased,

Libellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation; FRANCES E. CARDINALE,
Administratrix of the Estate of FRANK
JOSEPH CARDINALE, Also Known as
FRANK J. CARDINALE, Deceased; IDA-
LINE JENNER CARDINALE, et al.,

Respondents.

FINAL DECREE

The above-entitled cases having come on regularly
to be heard on the 3rd, 4th, 5th, 6th, 9th, 10th, 11th

and 12th days of September, 1957, and the court having considered the evidence, both oral and documentary, and the arguments of counsel, and the cause having been submitted and the court having made and entered its Findings of Fact and Conclusions of Law, Now, Therefore,

It Is Ordered, Adjudged and Decreed that libelant, Antoine Belleci, Administrator of the Estate of Jacques Cardinale, Deceased, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, the sum of \$41,417.23 of which the sum of \$20,000.00 is allocated to the widow, Marie Cardinale, \$7,500.00 is allocated to the daughter, Francoise Noel Cardinale, and \$12,000.00 is allocated to the son, Vincent Joseph Cardinale, and also of which the sum of \$1,917.23 is allocated for funeral expenses.

It Is Further Ordered, Adjudged and Decreed that libelant, Antoine Belleci, Administrator of the Estate of Jacques Cardinale, Deceased, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, his costs involved herein.

Dated: October 4th, 1957.

/s/ SYLVESTER J. RYAN,

United States District Judge.

Approved as to Form and receipt of a copy of the above and foregoing Final Decree is hereby acknowledged this 27th day of September, 1957.

BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,

/s/ MORTON L. SILVERS,

MORGAN & BEAUZAY,

Proctors for Respondents.

[Endorsed]: Filed Oct. 10, 1957.

[Title of District Court and Cause.]

No. 27125

NOTICE OF APPEAL

Notice Is Hereby Given that Union Oil Company of California, a corporation, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 11, 1957.

Dated: November 6th, 1957.

FREDERIC G. NAVE,

BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,

Attorneys for Appellant, Union Oil Company of California, a Corporation.

Receipt of copies acknowledged.

[Endorsed]: Filed November 7, 1957.

[Title of District Court and Cause.]

No. 27125

STIPULATION EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It is Hereby Stipulated and Agreed, by and between the attorneys for the parties hereto, subject to the order of the court, that the time within which respondent-appellant shall file the record on appeal and docket the appeal from judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including January 13, 1958.

Dated: December 12, 1957.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Attorneys for Libelant Antoine Belleci, Administrator of the Estate of Jacques Cardinale, Deceased.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Attorneys for Respondent-Appellant Union Oil
Company of California, a Corporation.

So Ordered: December 12, 1957.

/s/ GEO. B. HARRIS,

United States District Judge.

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

No. 27125

AFFIDAVIT OF FREDERIC G. NAVE

State of California,
City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says:

That he is an attorney and proctor of law duly licensed and admitted in the above-entitled court and is the proctor attorney for the appellant, Union Oil Company of California, a corporation, and makes this Affidavit for and on behalf of said appellant, Union Oil Company of California, a corporation; that heretofore on December 12, 1957, pursuant to stipulation and order of this court the time within which the Appellant, Union Oil Company of California, a corporation, should file its record on appeal and docket the appeal from the judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit was extended to and including January 13, 1958; that affiant has consulted with the reporters who are preparing the record and transcripts and has been advised that due to the press of work that the record and transcript is not yet completed and have requested an extension of time of thirty (30) days for such purposes; that affiant did communicate with Attorney John Whelan of the law firm of Michelson, Whelan & Michelson, of San Francisco,

who are the proctors and attorneys for the Libelant-Appellee, and did request the written stipulation consenting to such extension and was advised that while they would not grant a stipulation in writing that they had no objection to a court order granting such extension being entered.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of January, 1958.

[Seal] /s/ VIRGINIA A. HAMILTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 2, 1960.

[Endorsed]: Filed Jan. 13, 1958.

[Title of District Court and Cause.]

No. 27125

ORDER EXTENDING TIME

Upon reading the Affidavit of Frederic G. Nave, Proctor for Respondent and Appellant, Union Oil Company of California, a corporation, and for good cause appearing,

It Is Hereby Ordered that the time within which the Respondent-Appellant, Union Oil Company of California, a corporation, shall file the record or appeal and docket the appeal from the judgment

entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including February 12, 1958.

Dated: This January 13, 1958.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed January 13, 1958.

[Title of District Court and Cause.]

Nos. 27124 and 27125

(Consolidated)

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

Libel (Damages for Wrongful Death—\$150,000.00).

Answer to Libel.

Answer to Libel for Damages for Wrongful Death.

Minute Order, dated August 5, 1957, consolidating cases for trial.

Final Decree.

Notice of Appeal.

Designation of Contents of Records on Appeal.

Stipulation Extending Time to File Record and Docket Appeal.

Affidavit of Frederic G. Nave.

Order Extending Time.

Libelant's Exhibits 1 to 12, inclusive.

Respondents' Exhibits A to W, inclusive.

(Exhibits placed in file 27117.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of January, A.D. 1958.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15878. United States Court of Appeals for the Ninth Circuit. Union Oil Company of California, a Corporation, Appellant, vs. Antoine Belleci, Administrator of the Estate of Jacques Cardinale, Deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 16, 1958.

Docketed: February 5, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15878

ANTOINE BELLECI, Administrator of the Estate
of JACQUES CARDINALE, Deceased,

Libelant and Appellee,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents and Appellants.

APPELLANT'S STATEMENT
OF POINTS ON APPEAL

Appellant, Union Oil Company of California, a corporation, hereby submits its concise statement of points upon which appellant intends to rely in this appeal as follows:

1. The Court erred in finding that the injuries sustained by the libelant were caused or occasioned by negligence of appellant proximately causing or contributing to the explosion of the F/V Santa Lucia.

2. The Court erred in finding that the injuries sustained by the libelant occurred because of fault or negligence on the part of this respondent.

3. The Court erred in not finding that the sole cause of the injuries to the libelant was due to the

unseaworthiness of the F/V Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the F/V Santa Lucia.

4. The Court erred in finding that Charles Caldwell, the marine service station employee of appellant, was guilty of negligence contributing to the explosion and fire aboard the F/V Santa Lucia.

5. The Court erred in finding that respondent was guilty of negligence as a joint tortfeasor in this action.

6. The Court erred in finding that the appellant, Union Oil Company of California, was at fault and to blame for the injuries received by the libelant.

7. The Court erred in finding that the respondent, Union Oil Company of California, was jointly at fault and to blame with the co-owners, Frances E. Cardinale, administratrix of the estate of Frank J. Cardinale, and Idaline Jenner Cardinale, the co-owners of the F/V Santa Lucia.

8. The Court erred in failing to find, as a conclusion of law, that the appellant, Union Oil Company of California, was not negligent in any manner contributing to the explosion and fire of the F/V Santa Lucia and resulting injuries to libelant.

9. The Court erred in making findings of fact that Charles Caldwell, an employee of respondent, Union Oil Company of California, was negligent

and at fault when he failed to look at the gasoline meter until 581½ gallons had been delivered to the F/V Santa Lucia.

10. The Court erred in its findings of fact that the failure of the said Charles Caldwell, an employee of the Union Oil Company of California, to look at the gasoline meter until 581½ gallons had been delivered, was negligence contributing to or causing the explosion and fire aboard the F/V Santa Lucia and resulting injuries to libelant.

11. The Court erred in making and entering the findings of fact that the respondent, Union Oil Company of California, was negligent and at fault in not exercising reasonable care or prudence and that its failure so to do was a proximate cause of the explosion and fire on the F/V Santa Lucia and the resulting injuries to libelant.

12. The Court erred in that the findings of fact heretofore mentioned are not supported by any evidence in the trial of said action.

13. The Court erred in that there was no evidence to support its findings of negligence against the said Caldwell or this appellant heretofore specifically mentioned.

14. The Court erred in adopting conclusions of law inconsistent with its findings of facts.

15. The Court properly concluded that the explosion aboard the F/V Santa Lucia was due to an unseaworthiness aboard the Santa Lucia and to the

personal and active negligence of Frank J. Cardinale, one of the co-owners of the ship, but conclusions of law holding appellant, Union Oil Company of California, to be a joint tort feisor was inconsistent therein.

16. The Court erred in awarding judgment in favor of libelant against this appellant.

17. The Court erred in allowing excessive damages against this appellant.

18. That the amount of damages awarded libelant against this appellant included maintenance and cure which, under the evidence of this case, should not have been awarded against appellant.

19. That the money judgment awarded appellant was excessive and was not supported by the evidence in this case.

Dated: February, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR,

/s/ FREDERIC G. NAVE,
Proctors for Appellant Union
Oil Company of California.

[Endorsed]: Filed Feb. 5, 1958.

[Title of Court of Appeals and Cause.]

No. 15878

DESIGNATION OF THE CONTENTS
OF RECORD ON APPEAL

Appellant Union Oil Company of California, a corporation, designates the entire record pursuant to Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, including the Reporter's Transcript and all exhibits.

Dated : February, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Appellant Union Oil Company of California, a Corporation.

[Endorsed]: Filed Feb. 5, 1958.

No. 15878

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant,

vs.

ANTOINE BELLECI, Administrator of the Estate
of JACQUES CARDINALE, Deceased,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 29)

FILED

MAY - 2 1958

PAUL P. O'BRIEN; CLERK

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

No. 15877

**United States
Court of Appeals**
for the Ninth Circuit

**UNION OIL COMPANY OF CALIFORNIA, a
Corporation,**

Appellant,

vs.

ANTOINE BELLECI,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 29)

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Nave, Frederic G.	21
Answer to Libel, Union Oil Co.	10
Answer to Libel in Personam, Cardinale.	12
Attorneys, Names and Addresses of.	1
Certificate of Clerk to Record on Appeal.	23
Designation of Contents of Record on Appeal..	25
Final Decree	17
Findings of Fact, Conclusions of Law and Decision	16
Libel	3
Notice of Appeal.	19
Order Re Consolidation.	15
Order Extending Time.	22
Statement of Points on Appeal, Appellant's... ..	26
Stipulation Extending Time to File Record and Docket Appeal.	20

Transcript of Proceedings	57
---------------------------------	----

Witnesses:

Adagio, Horace

—direct	123
—cross	143, 163

Belleci, Antoine

—direct	271
—cross	288, 295
—redirect	298

Byrne, Joseph

—direct	629
---------------	-----

Caldwell, Charles Herbert

—direct	335
—cross	386, 398, 403
—voir dire	393
—redirect	418, 422, 426
—recross	421, 423, 425, 428

Civello, Arthur A.

—direct	575, 588, 598
—cross	584, 593

Cox, Wilbur J.

—direct	468
—cross	476

Del Rio, Rudy

—direct	489
—cross	497, 502
—recross	506

INDEX

PAGE

Witness—(Continued)

Hansen, Irvin

—direct	649
—cross	673, 675

Hill, James Ewing

—direct	552
—cross	565
—redirect	570
—recross	571

Johnson, Lester

—direct	509
—cross	427
—redirect	571

Lopez, Francisco Pedrasaz

—direct	302
—cross	321, 332

Mason, David M.

—direct	429
—cross	448, 460

McMillan, James Boyce

—direct	533, 541
—cross	547

Ray, Garrett

—direct	173
—cross	187, 208

Romeo, Salvatore

—direct	250
—cross	258

Witness—(Continued)

Salmeri, Joe John

—direct	77
—cross	96, 114
—redirect	121
—recross	119, 122

Tarantino, Nino

—direct	214
—cross	231, 242
—redirect	243

Washburn, George

—direct	605
—cross	621

NAMES AND ADDRESSES OF ATTORNEYS

RUSSELL ZACHES,
316 Professional Bldg.,
Monterey, California;

SAMUEL VARTAN,
1020 Russ Bldg.,
San Francisco 4, California;

MICHELSON, WHELAN AND MICHELSON,
1650 Russ Bldg.,
San Francisco 4, California,

Proctors for Libelant & Appellee.

FREDERIC G. NAVE,
BOYD & TAYLOR,
350 Sansome St.,
San Francisco, California,

Proctors for Respondent & Appellant.

In the District Court of the United States in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty No. 27123

ANTOINE BELLECI,

Libellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, FRANCES E. CARDINALE, Ad-
ministratrix of the Estate of FRANK JOSEPH
CARDINALE, Also Known as FRANK J.
CARDINALE, Deceased; IDALINE JENNER
CARDINALE, BLACK COMPANY, a Corpo-
ration; WHITE COMPANY, a Corporation;
JOHN DOE, RICHARD ROE AND PETER
ROE,

Respondents.

LIBEL

(Damages for Personal Injuries—\$25,000.00)

To the Honorable Judges of the Above-Entitled
Court:

The libel of Antoine Belleci, in a case of libel,
civil and maritime, for damages for personal in-
juries, alleges as follows:

I.

That the respondent Union Oil Company of Cali-
fornia is now and was at all times herein mentioned
a corporation duly organized and existing under and

by virtue of the laws of the State of California and authorized to do and doing business in the city and County of San Francisco, State and Northern District of California.

II.

That the respondents Black Company, a corporation, and White Company, a corporation, are now and were at all times mentioned herein corporations duly organized and existing under and by virtue of the laws of one of the States of the United States and were at all of said times authorized to do and doing business in said City and County of San Francisco, State and Northern District of California.

III.

That the true names of respondents Black Company, a corporation, White Company, a corporation, John Doe, Richard Roe and Peter Roe, are unknown to libelant and for that reason said respondents are sued herein under fictitious names. Libelant prays that when the true names of said respondents are ascertained they be substituted herein in the place and stead of said fictitious names.

IV.

That on or about the 28th day of September, 1954, Frank Joseph Cardinale, also known as Frank J. Cardinale, died; that thereafter, to wit, on the 12th day of November, 1954, after proceedings duly had for such purpose, respondent Frances E. Cardinale was duly appointed administratrix of the estate of Frank Joseph Cardinale, also known as

Frank J. Cardinale, Deceased, by the Superior Court of the State of California, in and for the County of Monterey and on said 12th day of November, 1954, qualified as such administratrix and entered upon the administration of said estate and ever since such time has been and now is the duly appointed, qualified and acting administratrix of the estate of said Deceased. That said Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, will hereinafter be referred to as "Decedent."

That at all times on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, and for a long time prior thereto, said Decedent and respondent Idaline Jenner Cardinale owned, operated, managed, controlled, navigated and maintained the fishing vessel Santa Lucia, which vessel was at all of said times a vessel of the American Merchant Marine, employed as a commercial fishing vessel.

VI.

That at all times on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, libelant was employed by said Decedent and respondent Idaline Jenner Cardinale, to work as a seaman, to wit, as a fisherman on board, and as a member of the crew of, said vessel Santa Lucia, and was working on board said vessel in the course and scope of his said employment; that during all of said times said vessel was afloat on navigable waters.

VII.

That on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged and for a long time prior thereto, respondent Union Oil Company of California, a corporation, owned, maintained, managed, operated and controlled, on piers and land at Avila, California, a commercial marine service and fueling station, gasoline, oil and other petroleum products, tanks and other facilities for the storage of said gasoline, oil and other petroleum products, and equipment for use in connection with said commercial marine service and fueling station, gasoline, oil, other petroleum products, tanks and other facilities.

VIII.

That on or about the 28th day of September, 1954, and at the time libelant was injured as hereinafter alleged, and while said vessel was moored at one of said piers in connection with the fueling of said vessel by respondent Union Oil Company of California, a corporation, and said commercial marine service and fueling station, said Decedent and respondents herein, except respondent administratrix, negligently caused and permitted an explosion and fire to occur in, on, around and about said vessel, whereby libelant was made weak, sick, sore, lame, stiff and disabled and caused to suffer a severe contusion and laceration of the left side of his head and face, contusions, bruises, strains, sprains and ecchymosis of his right forearm, right gluteal region and back and other parts of his body

and great nervous shock; that because of said injuries libelant ever since receiving the same, has been and always will be weak, sick, sore, lame, stiff and disabled; that the aforesaid negligence of Decedent and respondents herein, except respondent administratrix, directly and proximately caused libelant to be injured as aforesaid and Decedent and respondents herein, except respondent administratrix, did negligently cause and permit libelant to be so injured.

IX.

That because of said injuries, libelant has suffered ever since receiving the same and always will suffer great physical and mental pain and anguish.

X.

That immediately prior to being injured as aforesaid, libelant was in good physical and mental condition and earning or capable of earning at his occupation of seaman approximately \$350.00 per month, together with his board and lodging of the reasonable value of \$240.00 per month, but because of said injuries, libelant has been unable to work or earn any money since the said 28th day of September, 1954, will be unable to work or earn money for a long period of time to come, and thereafter will only be able to work and earn money at great financial loss.

XI.

That because of said injuries and the aforesaid negligence of Decedent and respondents herein, except respondent administratrix, libelant necessarily

incurred reasonable hospital and other medical bills in a reasonable sum presently unknown to libelant and libelant in the future will necessarily incur further and additional reasonable expenses for hospital and other medical expenses in an amount not as yet known to libelant, and as to which libelant prays leave to amend this libel and produce proof thereof at the time of trial.

XII.

That by reason of the premises, libelant has been damaged in the sum of \$25,000.00, which amount libelant asks be awarded to him by this Court.

XIII.

That libelant's aforesaid claim in respect to damages for personal injuries was heretofore and within the time prescribed for the filing of creditor's claims by the provisions of the Probate Code of California and the Notice to Creditors published by respondent Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, duly and regularly presented to the said Estate as directed in said Notice to Creditors, and said claim has been rejected and disallowed.

XIV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process, according to the courses of this Honorable Court in causes of

admiralty and maritime jurisdiction may issue against the respondents and each of them and that respondents and each of them may be cited to appear and answer, all and singular, the matters aforesaid and that this Honorable Court would be pleased to decree to the libelant the sum asked for by the libelant in the aforesaid libel and for costs and for such other and further relief as in law and justice libelant is entitled to receive.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Proctors for Libelant.

United States of America,
State and Northern District of California,
County of Monterey—ss.

Antoine Belleci, being first duly sworn, deposes and says:

That he is the libelant named in the above-entitled cause; that he has read the within and foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ ANTOINE BELLECI.

Subscribed and sworn to before me this 2nd day of May, 1955.

[Seal] /s/ EDNA MASON,
Notary Public in and for the County of Monterey,
State of California.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

No. 27123

ANSWER TO LIBEL

Comes now the Respondent, Union Oil Company of California, a corporation, and answering Libellant's Libel on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs IV, VI, VII, IX, X, and XIII, said respondent alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

II.

Answering Paragraphs VIII, and XI, denies each and every, all and singular, the allegations therein contained and each and every part thereof insofar

as the same names, mentions or concerns this answering respondent.

III.

Answering Paragraphs XII and XIV, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that Libelant, Antoine Belleci, has been damaged in the sum of \$25,000.00 or any other sum or sums whatsoever or at all.

Further answering said Libel, and as and for a separate and distinct defense thereto and plea of contributory negligence, said respondent alleges that Libelant, Antoine Belleci, was negligent and careless in and about the matters set forth in said Libel in the following manner, to-wit: That at the said time and place Libelant, Antoine Belleci, failed to use due or any care or caution for the protection of his own safety; that said acts of carelessness and negligence on his part proximately caused or contributed to the damage sustained or injury sustained.

Wherefore, said respondent prays that Libelant take nothing by his action and that said respondent be hence dismissed with its costs herein incurred.

BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Respondent, Union Oil Company of
California, a Corporation.

State of California,
City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says: That he is one of the proctors for respondent herein; that he has read the foregoing Answer to Libel and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of June, 1955.

[Seal] /s/ GINA MATTEUCCI,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires August 20, 1957.

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

No. 27123

ANSWER TO LIBEL IN PERSONAM

To the Honorable Judges of the Above-Entitled
Court:

Frances E. Cardinale, administratrix of the Estate of Frank Joseph Cardinale, also known as

Frank J. Cardinale, deceased, and Idaline Jenner Cardinale answer the Libel filed herein, admitting, denying and alleging as follows:

I.

Answering paragraphs II, III, VII, IX, X and XI of libelant's Libel, respondents allege that they have no information or belief sufficient to enable them to answer the allegations therein contained, and, placing their denial on that ground, deny each and every, all and singular, the allegations therein contained.

II.

Answering paragraphs V, VI, VIII and XII of said Libel, respondents deny each and every, all and singular, the allegations therein contained.

Deny that libelant Antoine Belleci has been damaged in the sum of \$25,000.00, or any other sum or sums whatever, or at all.

Wherefore, respondents Frances E. Cardinale and Idaline Jenner Cardinale pray that libelant take nothing by his action and that said respondents be dismissed with their costs herein incurred.

/s/ MORTON L. SILVERS,

MORGAN & BEAUZAY,

Proctors for Respondents Frances E. Cardinale and
Idaline Jenner Cardinale.

State of California,
City and County of San Francisco—ss.

Frances E. Cardinale, being first duly sworn, deposes and says:

That she is one of the respondents in the above action; that she has read the foregoing Answer to Libel in Personam, and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

/s/ FRANCES E. CARDINALE.

Subscribed and sworn to before me this 1st day of October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 18, 1958.

State of California,
City and County of San Francisco—ss.

Idaline Jenner Cardinale, being first duly sworn, deposes and says:

That she is one of the respondents in the above action; that she has read the foregoing Answer to Libel in Personam, and knows the contents thereof;

that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

/s/ IDALINE JENNER
CARDINALE.

Subscribed and sworn to before me this 1st day of October, 1955.

[Seal] /s/ PAULA G. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 18, 1958.

[Endorsed]: Filed Oct. 4, 1955.

[Title of District Court and Cause.]

MINUTE ORDER RE CONSOLIDATION
OF CASES

Aug. 5, 1957

Present:

The Honorable Louis E. Goodman,
District Judge.

27116—Salmeri vs. Cardinale.

27117—Salmeri vs. Union Oil Co. of Calif.

27118—Pedrasaz vs. Cardinale.

27119—Pedrasaz vs. Union Oil Co. of Calif.

- 27120—Tarantino vs. Cardinale.
- 27121—Tarantino vs. Union Oil Co. of Calif.
- 27122—Belleci vs. Cardinale.
- 27123—Belleci vs. Union Oil Co. of Calif.
- 27124—Belleci vs. Cardinale.
- 27125—Belleci vs. Union Oil Co. of Calif.
- 27156—J. Romeo vs. Union Oil Co. of Calif.
- 27157—S. Romeo vs. Union Oil Co. of Calif.
- 27158—Cardinale vs. Union Oil Co. of Calif.
- 27159—Adagio vs. Union Oil Co. of Calif.

The above-entitled cases came on regularly this day to be set for trial. On motion of John Whelan, Esq., Ordered all of these cases and case No. 27364—Cardinale vs. Union Oil Company—be consolidated and trial set for August 26, 1957.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND DECISION OF THE COURT

(Reporter's Transcript—Sept. 12, 1957)

[See Volume I, Pages 17 to 43, Case No. 15875,
Joseph Salmeri vs. Union Oil Co., etc.]

In the District Court of the United States, in and
for the Southern Division of the Northern
District of California.

In Admiralty No. 27122 and 27123
(Consolidated)

ANTOINE BELLECI,

Libellant,

vs.

FRANCES E. CARDINALE, Administratrix of
the Estate of FRANK JOSEPH CARDI-
NALE, Also Known as FRANK J. CARDI-
NALE, Deceased, IDALINE JENNER CAR-
DINALE, et al.,

Respondents.

ANTOINE BELLECI,

Libellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, FRANCES E. CARDINALE,
Administratrix of the Estate of FRANK JO-
SEPH CARDINALE, Also Known as FRANK
J. CARDINALE, Deceased, IDALINE JEN-
NER CARDINALE, et al.,

Respondents.

FINAL DECREE

The above-entitled cases having come on regu-
larly to be heard on the 3rd, 4th, 5th, 6th, 9th, 10th,
11th and 12th days of September, 1957, and the

Court having considered the evidence, both oral and documentary, and the arguments of counsel, and the cause having been submitted and the Court having made and entered its Findings of Fact and Conclusions of Law, Now, Therefore,

It Is Ordered, Adjudged and Decreed that libelant, Antoine Belleci, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, the total sum of \$3,515.12.

It Is Further Ordered, Adjudged and Decreed that libelant, Antoine Belleci, recover of and from the respondents, Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, also known as Frank J. Cardinale, Deceased, and Idaline Jenner Cardinale, and Union Oil Company of California, a corporation, jointly and severally, his costs involved herein.

Dated: October 4th, 1957.

/s/ SYLVESTER J. RYAN,
United States District Judge.

Approved as to Form and receipt of a copy of the above and foregoing Final Decree is hereby acknowledged this 27th day of September, 1957.

BOYD & TAYLOR,
/s/ FREDERIC G. NAVE,

/s/ MORTON L. SILVERS,
MORGAN & BEAUZAY,
Proctors for Respondents.

[Endorsed]: Filed Oct. 10, 1957.

[Title of District Court and Cause.]

No. 27123

NOTICE OF APPEAL

Notice Is Hereby Given that Union Oil Company of California, a corporation, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 11, 1957.

Dated: November 6, 1957.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Attorneys for Appellant, Union Oil Company of
California, a Corporation.

[Endorsed]: Filed Nov. 7, 1957.

[Title of District Court and Cause.]

No. 27123

STIPULATION EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It Is Hereby Stipulated and Agreed, by and between the attorneys for the parties hereto, subject to the order of the Court, that the time within which respondent-appellant shall file the record on appeal and docket the appeal from judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including January 13, 1958.

Dated: December 12, 1957.

/s/ RUSSELL ZACHES,

/s/ SAMUEL VARTAN,

MICHELSON, WHELAN &
MICHELSON,

Attorneys for Libelant
Antoine Belleci.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Attorneys for Respondent-Appellant Union Oil
Company of California, a Corporation.

So Ordered: December 12, 1957.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed Dec. 16, 1957.

[Title of District Court and Cause.]

No. 27123

AFFIDAVIT OF FREDERIC G. NAVE

State of California,
City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says:

That he is an attorney and proctor of law duly licensed and admitted in the above-entitled Court and is the proctor attorney for the appellant, Union Oil Company of California, a corporation, and makes this affidavit for and on behalf of said appellant, Union Oil Company of California, a corporation; that heretofore on December 12, 1957, pursuant to stipulation and order of this Court the time within which the Appellant, Union Oil Company of California, a corporation should file its record on appeal and docket the appeal from the judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit was extended to and including January 13, 1958; that affiant has consulted with the reporters who are preparing the record and transcripts and has been advised that due to the press of work that the record and transcript is not yet completed and have requested an extension of time of thirty (30) days for such purposes; that affiant did communicate with attorney, John Whelan, of the law firm of Michelson, Whelan & Michelson, of San Fran-

cisco, who are the proctors and attorneys for the Libelant, Appellee, and did request the written stipulation consenting to such extension and was advised that while they would not grant a stipulation in writing that they had no objection to a court order granting such extension being entered.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of January, 1958.

[Seal] /s/ VIRGINIA A. HAMILTON,
Notary Public, in and for the City and County of
San Francisco, State of California.

My Commission Expires May 2, 1960.

[Endorsed]: Filed January 13, 1958.

[Title of District Court and Cause.]

No. 27123

ORDER EXTENDING TIME

Upon reading the Affidavit of Frederic G. Nave, Proctor for Respondent and Appellant, Union Oil Company of California, a corporation, and for good cause appearing ;

It Is Hereby Ordered that the time within which the Respondent, Appellant, Union Oil Company of California, a corporation, shall file the record on appeal and docket the appeal from the judgment

entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including February 12, 1958.

Dated: January 13, 1958.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed Jan. 13, 1958.

[Title of District Court and Cause.]

No. 27123

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein:

Libel (Damages for Personal Injuries — \$25,000.00).

Answer to Libel.

Libel in Personam.

Deposition of Antoine Belleci.

Minute Order dated August 5, 1957, consolidating cases for trial.

Final Decree.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Stipulation Extending Time to File Record and Docket Appeal.

Affidavit of Frederic G. Nave.

Order Extending Time.

Libelant's Exhibits 1 to 12, inclusive.

Respondent's Exhibits A to W, inclusive.

(Exhibits placed in file 27117.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of January, A.D. 1958.

C. W. CALBREATH,
Clerk.

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15877. United States Court of Appeals for the Ninth Circuit. Union Oil Company of California, a Corporation, Appellant, vs. Antoine Belleci, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 16, 1958.

Docketed: February 5, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15877

ANTOINE BELLECI,

Libelant and Appellee,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents and Appellants.

DESIGNATION OF THE CONTENTS
OF RECORD ON APPEAL

Appellant Union Oil Company of California, a corporation, designates the entire record pursuant to Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, including the Reporter's Transcript and all exhibits.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Appellant Union Oil Company of California, a Corporation.

[Endorsed]: Filed Feb. 5, 1958.

[Title of Court of Appeals and Cause.]

No. 15877

APPELLANT'S STATEMENT
OF POINTS ON APPEAL

Appellant Union Oil Company of California, a corporation, hereby submits its concise statement of points upon which appellant intends to rely in this appeal as follows:

1. The Court erred in finding that the injuries sustained by the libelant were caused or occasioned by negligence of appellant proximately causing or contributing to the explosion of the F/V Santa Lucia.

2. The Court erred in finding that the injuries sustained by the libelant occurred because of fault or negligence on the part of this respondent.

3. The Court erred in not finding that the sole cause of the injuries to the libelant was due to the unseaworthiness of the F/V Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the F/V Santa Lucia.

4. The Court erred in finding that Charles Caldwell, the marine service station employee of appellant, was guilty of negligence contributing to the explosion and fire aboard the F/V Santa Lucia.

5. The Court erred in finding that respondent was guilty of negligence as a joint tortfeasor in this action.

6. The Court erred in finding that the appellant, Union Oil Company of California, was at fault and to blame for the injuries received by the libelant.

7. The Court erred in finding that the respondent, Union Oil Company of California, was jointly at fault and to blame with the co-owners, Frances E. Cardinale, administratrix of the estate of Frank J. Cardinale, and Idaline Jenner Cardinale, the co-owners of the F/V Santa Lucia.

8. The Court erred in failing to find, as a conclusion of law, that the appellant, Union Oil Company of California, was not negligent in any manner contributing to the explosion and fire of the F/V Santa Lucia and resulting injuries to libelant.

9. The Court erred in making findings of fact that Charles Caldwell, an employee of respondent, Union Oil Company of California, was negligent and at fault when he failed to look at the gasoline meter until 58½ gallons had been delivered to the F/V Santa Lucia.

10. The Court erred in its findings of fact that the failure of the said Charles Caldwell, an employee of the Union Oil Company of California, to look at the gasoline meter until 58½ gallons had been delivered, was negligence contributing to or causing the explosion and fire aboard the F/V Santa Lucia and resulting injuries to libelant.

11. The Court erred in making and entering the findings of fact that the respondent, Union Oil

Company of California, was negligent and at fault in not exercising reasonable care or prudence and that its failure so to do was a proximate cause of the explosion and fire on the F/V Santa Lucia and the resulting injuries to libelant.

12. The Court erred in that the findings of fact heretofore mentioned are not supported by any evidence in the trial of said action.

13. The Court erred in that there was no evidence to support its findings of negligence against the said Caldwell or this appellant heretofore specifically mentioned.

14. The Court erred in adopting conclusions of law inconsistent with its findings of facts.

15. The Court properly concluded that the explosion aboard the F/V Santa Lucia was due to an unseaworthiness aboard the Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the ship, but conclusions of law holding appellant, Union Oil Company of California, to be a joint tort feisor was inconsistent therein.

16. The Court erred in awarding judgment in favor of libelant against this appellant.

17. The Court erred in allowing excessive damages against this appellant.

18. That the amount of damages awarded libelant against this appellant included maintenance and

cure which, under the evidence of this case, should not have been awarded against appellant.

19. That the money judgment awarded appellant was excessive and was not supported by the evidence in this case.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Appellant, Union
Oil Company of California.

[Endorsed]: Filed Feb. 5, 1958.

No. 15879

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant,

vs.

IDALENE J. CARDINALE, and FRANCES E.
CARDINALE, Administratrixes of the Estate
of FRANK J. CARDINALE, Deceased,

Appellees.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 36)

FILED

MAY - 2 1958

PAUL P. O'BRIEN; CLERK

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

No. 15879

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellant,

vs.

IDALENE J. CARDINALE, and FRANCES E.
CARDINALE, Administratrixes of the Estate
of FRANK J. CARDINALE, Deceased,

Appellees.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 36)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Nave, Frederic G.	28
Answer to Libel.	21
Attorneys, Names and Addresses of.	1
Certificate of Clerk to Record on Appeal.	30
Designation of Contents of Record on Appeal. .	32
Findings of Fact, Conclusions of Law and Decision	23
Interlocutory Decree	24
Libel	3
Motion to Dismiss and Exceptions to Libel. . . .	8
Notice of Appeal.	26
Order Re Consolidation.	22
Order Denying Motion to Dismiss and Overruling Exceptions to Libel.	20
Order Extending Time.	29
Statement of Points on Appeal, Appellant's. . .	33
Stipulation Extending Time to File Record and Docket Appeal	27

Transcript of Proceedings	57
---------------------------------	----

Witnesses:

Adagio, Horace

—direct	123
—cross	143, 163

Belleci, Antoine

—direct	271
—cross	288, 295
—redirect	298

Byrne, Joseph

—direct	629
---------------	-----

Caldwell, Charles Herbert

—direct	335
—cross	386, 398, 403
—voir dire	393
—redirect	418, 422, 426
—recross	421, 423, 425, 428

Civello, Arthur A.

—direct	575, 588, 598
—cross	584, 593

Cox, Wilbur J.

—direct	468
—cross	476

Del Rio, Rudy

—direct	489
—cross	497, 502
—recross	506

INDEX

PAGE

Witness—(Continued)

Hansen, Irvin

—direct	649
—cross	673, 675

Hill, James Ewing

—direct	552
—cross	565
—redirect	570
—recross	571

Johnson, Lester

—direct	509
—cross	427
—redirect	571

Lopez, Francisco Pedrasaz

—direct	302
—cross	321, 332

Mason, David M.

—direct	429
—cross	448, 460

McMillan, James Boyce

—direct	533, 541
—cross	547

Ray, Garrett

—direct	173
—cross	187, 208

Romeo, Salvatore

—direct	250
—cross	258

Witness—(Continued)

Salmeri, Joe John

—direct	77
—cross	96, 114
—redirect	121
—recross	119, 122

Tarantino, Nino

—direct	214
—cross	231, 242
—redirect	243

Washburn, George

—direct	605
—cross	621

NAMES AND ADDRESSES OF ATTORNEYS

MORTON L. SILVERS,

Flood Building,
870 Market St.,
San Francisco, Calif.;

MORGAN AND BEAUZEY,

28 North First St.,
San Jose 13, California,

Proctors for Libelant & Appellee.

FREDERIC G. NAVE,

BOYD & TAYLOR,

350 Sansome St.,
San Francisco, California,

Proctors for Respondent & Appellant.

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty No. 27364

IDALENE J. CARDINALE and FRANCES E.
CARDINALE, Administratrix of the Estate of
FRANK J. CARDINALE, Deceased,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation; BLACK COMPANY, a Corpora-
tion; WHITE COMPANY, a Co-partnership;
FIRST DOE and SECOND DOE,

Respondents.

LIBEL

In Personam for Damages for Loss of Vessel
(\$75,000.00)

To the Honorable Judges of the Above-Entitled
Court:

The libel of Idalene J. Cardinale and Frances E.
Cardinale, Administratrix of the Estate of Frank
J. Cardinale, Deceased, in a cause of libel, civil
and maritime, for damages for the loss of the
D/F/V "Santa Lucia," alleges as follows:

I.

This Court has jurisdiction of this cause pursuant
to the provisions of 46 U.S.C. 740.

II.

That Respondent Union Oil Company is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That at all times herein mentioned Respondents First Doe and Second Doe were the agents and employees of Respondent Union Oil Company and were engaged in the course and scope of said agency and employment.

IV.

That the true names of Respondents First Doe, Second Doe, Black Company, a corporation, and White Company, a copartnership, are unknown to libelants, who therefore sue said respondents by said fictitious names, and pray leave of Court to amend this libel to show the true names and capacities of said respondents when these have been ascertained.

V.

Libelant Idalene J. Cardinale is and was at the times hereinafter mentioned a one-half owner of the Diesel Fishing Vessel "Santa Lucia," official registry No. 236703.

VI.

Frank J. Cardinale, also known as Frank Joseph Cardinale, was the owner of the other one-half interest in the D/F/V "Santa Lucia" until the time of his death, September 28, 1954, which occurred

in an explosion aboard said vessel as hereinafter described.

VII.

Libelant Frances E. Cardinale, widow of Frank J. Cardinale, was appointed and duly qualified as Administratrix of the Estate of Frank J. Cardinale, also known as Frank Joseph Cardinale, Deceased, on November 2, 1954, in probate proceeding No. 13407 in the Superior Court of Monterey County, California.

VIII.

The D/F/V "Santa Lucia" was a wooden purse seiner 72.8 feet in length, 20.5 feet in breadth, 9.6 feet in depth, gross tonnage 109, net tonnage 69, and was at the times hereinafter mentioned used for commercial fishing purposes in the waters of the Pacific Ocean.

IX.

Said D/F/V "Santa Lucia" was at all times herein mentioned, in all respects seaworthy and properly and efficiently officered, manned, supplied, equipped and furnished and well and sufficiently fitted and supplied with suitable engines, machinery, tackle, apparel, appliances and furniture, all in good order and condition and suitable for the purpose, voyage and trade in which she was engaged. The owners of said vessel had, at the commencement of the voyage of said vessel hereinafter mentioned, and at all times prior thereto and at all times thereafter herein mentioned, exercised due

diligence to make said vessel in all respects seaworthy and properly and efficiently officered; manned, supplied, equipped and furnished and well and sufficiently fitted and supplied with suitable engines, machinery, tackle, apparel, appliances and furniture.

X.

The D/F/V "Santa Lucia," or what remains of her, now lies in twenty feet of water approximately three-quarters of a mile from shore near Avila, California, and has been abandoned, and has become a total loss and of no value.

XI.

That on or about September 28, 1954, at Avila, California, respondents negligently maintained, inspected, operated and controlled the gas fueling equipment and dock there located, said dock according to libelants' information and belief being known as the Union Oil Company dock at Avila, California; negligently fueled, and supervised the fueling of the "Santa Lucia," of which vessel said Frank J. Cardinale was part owner and engineer, while said vessel was moored to said dock; negligently failed to observe, watch and control the quantity of gasoline pumped aboard said vessel from the Union Oil Company gasoline pump located on said dock; negligently and carelessly permitted more gasoline to be pumped aboard said vessel than was ordered or the vessel's gasoline tank would hold; negligently permitted the "Santa Lucia" to dock and be moored

in an area where a dangerous accumulation of vapors and gaseous fuel existed; and negligently and carelessly failed to warn the crew or master of the "Santa Lucia" of said accumulation.

XII.

That solely as a direct and proximate result of the foregoing negligence of respondents, an explosion occurred which destroyed the D/F/V "Santa Lucia," and caused its entire loss.

XIII.

That said D/F/V at the time of said explosion had a reasonable market value of \$75,000.00.

XIV.

That as a direct and proximate result of the foregoing negligence and carelessness of respondents, libelants have been damaged in the sum of \$75,000.00.

XV.

All and singular, the premises are true and within the admiralty and maritime jurisdiction of this honorable Court.

Wherefore, libelants pray that citations in due form of law may issue against the respondents herein, citing them to appear and answer in the premises; that this Court decree the payment by said respondents to the libelants of the sum of \$75,000.00, together with interest and costs; and

that libelants may have such other and further relief as may be just.

/s/ MORTON L. SILVERS,
MORGAN & BEAUZEY,
Proctors for Libelants.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

No. 27364

MOTION TO DISMISS AND
EXCEPTIONS TO LIBEL

Comes now Respondent Union Oil Company of California, a corporation, and excepts to the libel herein and moves for the dismissal of libelants' filed herein, and bases its motion and exceptions on the following matters:

I.

That on or about April 4, 1955, one of the libelants herein, Frances Cardinale, did file a Libel In Personam, No. 27098 in the above-entitled Court in which Libel the same or substantially the same allegations of negligence were set forth as against this respondent, Union Oil Company of California, a corporation.

That in said Libel No. 27098 in Paragraph VIII thereof the following allegations appear:

“That on or about September 28, 1954, at Avila, California, respondents negligently maintained, inspected, operated and controlled the gas fueling equipment and dock there located, said dock according to libelants’ information and belief being known as the Union Oil Company dock at Avila, California; negligently fueled, and supervised the fueling of the Santa Lucia, of which vessel said Frank Cardinale was part owner and engineer, while said vessel was moored to said dock; negligently failed to observe, watch and control the quantity of gasoline pumped aboard said vessel from the Union Oil Company gasoline pump located on said dock; negligently permitted the Santa Lucia to dock and be moored in an area where a dangerous accumulation of vapors and gaseous fuel existed; and negligently and carelessly failed to warn the crew or master of the Santa Lucia of said accumulation.”

II.

That on or about July 23, 1956, the said Frances E. Cardinale, Administratrix of the Estate of Frank J. Cardinale, Deceased, joined with Idalene J. Cardinale in the filing of the Libel In Personam for Damages for Loss of Vessel in Action No. 27364 as against respondent, Union Oil Company, a corporation. That Paragraph XI of said Libel charges the said respondent with negligence in the same or sub-

stantially the same language as in Paragraph VIII of said Libel No. 27098.

III.

That the Proctors for Libelants, Morton L. Silvers, and Morgan and Beauzay, were the same Proctors in both of said Libels.

IV.

That the Libel No. 27364 was not filed until almost twenty-two months after the explosion which resulted in the destruction of the F/V "Santa Lucia," although Libelants both allegedly owned an undivided one-half interest in said vessel on September 28, 1954, when an explosion occurred causing the death of Frank J. Cardinale.

V.

That the action of Frances Cardinale, as widow and as guardian of the children of the said Frank Cardinale, No. 27098, was tried before the Honorable Michael J. Roche, Chief Judge of the above-entitled Court, commencing on November 30, 1955, and was terminated upon a complete trial by a Judgment of this Court finding in favor of the Respondent, Union Oil Company of California, a corporation, and against the Libelants, Frances Cardinale, individually and as guardian ad litem in said Action No. 27098.

VI.

That certain Findings of Fact and Conclusions of Law were made by the said Honorable Michael

J. Roche, that said Findings of Fact and Conclusions of Law were as follows:

“Boyd & Taylor,
“Attorneys at Law,
“350 Sansome Street,
“San Francisco, California.
“DOuglas 2-1076.

“In the United States Court for the Northern District of California, Southern Division
“No. 27098

“FRANCES CARDINALE, et al.,
“Libelants,
“vs.

“UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,
“Respondents.

“FINDINGS OF FACT AND CONCLUSIONS
OF LAW

“The above-entitled cause coming on for trial on the 30th day of November, 1955, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury; Morton L. Silvers, and Robert Morgan of Morgan and Beauzay, appearing as proctors for Libelants, Frances Cardinale, et al., and M. K. Taylor and Frederic G. Nave, of Boyd & Taylor, appearing as proctors for Respondent Union Oil Company of California,

a corporation; and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision and the court being fully advised in the premises now makes its findings of fact as follows:

“Findings of Fact

“1. On September 28, 1954, shortly before 5:30 o'clock, p.m., the fishing boat, Santa Lucia, came into the Union Oil Dock at Avila, California, in order to take aboard gasoline.

“2. That as the fishing boat, Santa Lucia, came into the Union Oil Dock, the tanker, “Lompoc,” which was standing at least two hundred, to two hundred fifty feet away, was finishing the loading of almost one and one-half million gallons of Orcutt enriched crude oil, which it had been loading for some six and one-half hours before the appearance of the Santa Lucia. This fuel, Orcutt, is highly volatile containing approximately seventeen per cent natural gasoline.

“3. The dock attendant, an employee of the respondent, Union Oil Company, passed a gasoline hose down to the fishing boat, Santa Lucia, which was standing approximately fifteen feet below the dock, and opened the valves at the meter allowing gasoline to flow into the gasoline lines. As decedent took the hose, the dock attendant asked him approximately how much gasoline he would need. Decedent replied about thirty (30) gallons. Decedent then

placed the nozzle into the fill opening of the gasoline tank, which opening was flush with the deck, and commenced fueling operations. The nozzle of the gasoline hose was a spring lever type and so constructed that to permit the flow of gasoline through the nozzle a lever was opened by manual pressure and to stop the flow the lever was merely released.

“4. That the gasoline tank aboard the fishing boat, Santa Lucia, was located under the deck, held there by hangars, and could only be seen by someone below deck. That decedent had complete control, once the hose was passed to him, of the flow of gasoline into the tank. As there was a shutoff at the end of the hose, decedent could have stopped the flow of gasoline at any time.

“5. There was a meter which measured the flow of gasoline, which stood approximately twenty-six inches high above the floor of the dock, and was located six feet back from the edge of the dock, where it could not be seen by decedent in the boat, located as it was, below the dock. A meter reading taken some time later indicated that fifty-eight gallons of gasoline had been delivered out of the storage tanks on the dock.

“6. The fishing vessel's gasoline tank had a maximum capacity of about forty gallons. No gasoline spilled on the deck of the fishing boat, Santa Lucia, showing that decedent had not allowed the tank to overfill.

“7. Approximately one and one-half hours before the Santa Lucia commenced fueling an inspection of the boat for insurance purposes had been made by a Captain Hansen, an experienced marine surveyor. It was his opinion that at the time of his inspection the fishing boat was seaworthy and that its gas tank was in sound condition. That on a prior inspection, approximately one year before the accident, Captain Hansen, found and reported the fishing boat to be in poor housekeeping, the wiring in poor condition and the boat to be generally filthy and dirty. The same general conditions were found to exist when Captain Hansen again inspected the boat on or about the 10th day of September, 1954, or within a few weeks prior to the accident. At no time did Captain Hansen make any examinations of the gas tank other than running his hand over the top of the tank and feeling the valves. He did not know of what material the tank was made, nor its capacity, and he did not run any pressure test on the tank.

“8. That gasoline vapors accumulated in the hold of the fishing boat resulting in a tremendous underwater explosion aboard the fishing boat. That the explosion and fire resulted from a defective condition of the gasoline tank of the fishing boat Santa Lucia.

“9. That there was no casual relationship between the fueling of the tanker “Lompoc” and the explosion and fire aboard the fishing boat, Santa

Lucia, or the following fire on the marine service dock.

“10. That the fueling equipment on the dock was not defective. Nor was there any defect in the gasoline storage tank on the dock or the lines that run from the tank to the meter. The gasoline storage tank itself was not ruptured or blown up, and the gasoline that was in the storage tank itself was salvaged and used later. All of the pipes and connections running from the gasoline storage tank to the meter were determined to be sound.

“From the foregoing facts the court concludes as follows:

“Conclusions of Law

“1. Libelants have failed to produce sufficient evidence against the respondents that they were responsible for the explosion and fire resulting in the death of decedent.

“2. That Libelants have failed to produce any evidence showing any casual relationship between the fueling of the tanker “Lompoc” and the explosion and fire aboard the fishing boat Santa Lucia.

“3. That from the evidence in this case the inferences of negligence is such that the court finds as a matter of law that the explosion and fire resulted from a defective condition of the gasoline tank aboard the fishing boat Santa Lucia.

“4. That Libelants have failed to sustain the burden of proof that the death of decedent was due

to any negligence or omission on the part of the respondents.

“5. That Libelants have not proven the allegations of their Libel or their several theories set forth therein.

“6. That Libelants are not entitled to recover any damages from the respondents herein upon their Libel filed herein.

“7. That judgment be entered herein, upon these findings of fact and conclusions of law for the respondent.

“8. That each party pay their own costs in this action incurred.

“Dated: This 30th day of January, 1956.

“MICHAEL J. ROCHE,

“Chief Judge, United States
District Court.”

VII.

That said Findings of Fact and Conclusions of Law constitute res judicata on all matters set forth therein as appertaining to the cause of the explosion and destruction of the said F/V “Santa Lucia” as against both Libelants in Action No. 27364 and/or against Frances E. Cardinale, Administratrix of the Estate of Frank J. Cardinale, deceased, and/or Idalene J. Cardinale.

VIII.

That said judgment and Findings in said action No. 27098 are conclusive on the matters of alleged

negligence set forth in Paragraph XI of Action No. 27364 and do constitute an Estoppel as against either or both of the Libelants herein.

IX.

That any action or libel for the destruction of the F/V "Santa Lucia" and the property damages arising therefrom could have been the subject matter of and joined or filed with Action No. 27098.

X.

That the Libelant, Idalene J. Cardinale, is in privity with her sister-in-law, Frances Cardinale, and was at all times conversant with and had knowledge of the filing of action No. 27098, and is in fact a respondent in the divers other actions filed by various crew members of the F/V "Santa Lucia" against Union Oil Company, Frances E. Cardinale, Administratrix of the Estate of Frank Cardinale, in the above-entitled Court in Actions Nos. 27156, 27157, 27158, 27159, 27117, 27119, 27121, 27123, and 27125, and as a result of such knowledge is guilty of laches prejudicing the rights of and causing needless expense to the respondent, Union Oil Company, in defending this action and needless consumption of the judicial processes of this Honorable Court.

XI.

That it is inequitable to permit a retrial and re-litigation of the facts and circumstances concerning the destruction of the F/V "Santa Lucia" in an action filed for that purpose after all pertinent facts

and circumstances have heretofore been tried, litigated and determined adversely to the contentions now raised in Action No. 27098, and that said Libelants are estopped from filing or trying their said Libel in law and by equity.

Wherefore, respondent prays that the Libel be dismissed.

BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Respondent
Union Oil Company.

Memorandum of Points and Authorities

The Kermit,

(CC9) 76 Fed. 2d 363;

California Casualty Indem. Exch. v. U. S.,

(DC Cal.) 74 F Supp. 408;

Lorraine v. Coastwise Lines,

(DC Cal.) 86 F Supp. 336;

Smith v. Sheffey,

113 C. A. 2d 741;

The Verna,

(DC N.Y.) 27 Fed. Supp. 679;

The William F. McRae,

(DC Mich.) 23 Fed. 557;

Kelliker v. Stone & Webster,

(CC Fla.) 75 Fed. 2nd 331;

Chicago Cemetery Assn. v. U.S.,
(DC Ill.) 19 Fed. Supp. 228;

U.S. v. Kusche,
(DC Cal.) 56 Fed. Supp. 201;

Runyan v. Great Lakes Dredge & Dock Co.,
(CC Iowa) 141 Fed. 2d 396;

Fulsom v. Quaker Oil & Gas Co.,
(CC Okla) 35 Fed. 2d 84;

Goodno v. Kotchkiss,
(DC Conn.) 237 Fed. 686;

Phoenix Mutual Life Ins. Co. v. Riley,
(DC Pa.) 75 Fed. Supp. 886;

Western Pacific R. Corp. v. Western Pacific
Ry. Co., (CC 9) 216 Fed. 2d 513;

MacDonnell v. Capital Co.,
(CC 9) 13 Fed. 2d 311.

State of California,
City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes
and says:

That he is one of the attorneys for the Respond-
ent Union Oil Company, a corporation, in the above-
entitled action; that he has read the foregoing Mo-
tion to Dismiss and Exceptions to Libel and knows
the contents thereof; that the same is true of his
own knowledge except as to matters therein stated

on information and belief and as to those matters that he believes it to be true.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 31st day of October, 1956.

[Seal] /s/ VIRGINIA R. HAMILTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 2, 1960.

[Endorsed]: Filed Nov. 2, 1956.

Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

No. 27364

Order Denying Motion to Dismiss and Overruling
Exceptions to Libel

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that the motion to dismiss be, and the same hereby is, Denied, and the exceptions to the libel be, and the same hereby are, Overruled.

Dated: December 20, 1956.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Title of District Court and Cause.]

No. 27364

ANSWER TO LIBEL

Comes now the Respondent Union Oil Company of California, a corporation, and answering Libelants' Libel on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs V, VI VII, VIII, X and XIII said respondent alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that libelants, Idalene J. Cardinale and Frances E. Cardinale, have been damaged in the sum of \$75,000.00 or any other sum or sums whatsoever or at all.

II.

Answering Paragraphs IX, XI, XIV and XV, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that libelants, Idalene J. Cardinale and Frances E. Cardinale, have been damaged in the sum of \$75,000.00 or any other sum or sums whatsoever or at all.

Further answering said Libel and as and for a separate and distinct defense thereto and plea of contributory negligence, said respondent alleges that libelants, Idalene J. Cardinale and Frances E. Cardinale, were negligent and careless in and about the matters set forth in said Libel in the following manner, to wit: That at said time and place libelants, Idalene J. Cardinale and Frances E. Cardinale, failed to use due or any care or caution for the protection of their own property; that said acts of carelessness and negligence on their part proximately caused or contributed to the damage sustained, if any there was.

Wherefore, said respondent prays that libelants take nothing by their action and that said respondent be dismissed with its costs herein incurred.

BOYD & TAYLOR,
FREDERIC G. NAVE;

By /s/ FREDERIC G. NAVE,
Attorneys for Respondent, Union Oil Company of
California, a Corporation.

[Endorsed]: Filed Dec. 31, 1956.

[Title of District Court and Cause.]

MINUTE ORDER RE CONSOLIDATION
OF CASES

Present: The Honorable Louis E. Goodman,
District Judge.

27116—Salmeri vs. Cardinale;

- 27117—Salmeri vs. Union Oil Co. of Calif.;
- 27118—Pedrasaz vs. Cardinale;
- 27119—Pedrasaz vs. Union Oil Co. of Calif.;
- 27120—Tarantino vs. Cardinale;
- 27121—Tarantino vs. Union Oil Co. of Calif.;
- 27122—Belleci vs. Cardinale;
- 27123—Belleci vs. Union Oil Co. of Calif.;
- 27124—Belleci vs. Cardinale;
- 27125—Belleci vs. Union Oil Co. of Calif.;
- 27156—J. Romeo vs. Union Oil Co. of Calif.
- 27157—S. Romeo vs. Union Oil Co. of Calif.;
- 27158—Cardinale vs. Union Oil Co. of Calif.;
- 27159—Odagio vs. Union Oil Co. of Calif.

The above-entitled cases came on regularly this day to be set for trial. On motion of John Whelan, Esq., Ordered all of these cases and case No. 27364—Cardinale vs. Union Oil Company—be consolidated and trial set for August 26, 1957.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND DECISION OF THE COURT

Reporters Transcript—Sept. 12, 1957

[See Volume I, Pages 17 to 43, Case No. 15875,
Joseph Salmeri vs. Union Oil Co., etc.]

In the District Court of the United States in and
for the Southern Division of the Northern Dis-
trict of California

In Admiralty—No. 27364

FRANCES E. CARDINALE, Administratrix of
the Estate of FRANK JOSEPH CARDI-
NALE, etc., Deceased, and IDALINE JEN-
NER CARDINALE,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Respondent.

INTERLOCUTORY DECREE

The above-entitled cause, having come on for trial regularly to be heard on the 3rd, 4th, 5th, 6th, 9th, 10th, 11th and 12th days of September, 1957, and the Court having considered the evidence both oral and documentary, and having been argued and submitted by the proctors for the respective parties and the cause having been submitted and the Court having made and entered its Findings of Fact and Conclusions of Law holding both libelants and respondent to blame, and directing a decree accordingly,

Now, on motion of Morton L. Silvers, proctor for the libelants,

It Is Ordered, Adjudged and Decreed that the opinion of this Court heretofore rendered on the 12th day of September, 1957, be and is hereby adopted as the Court's Findings of Fact and Conclusions of Law, and

It Is Further Ordered, Adjudged and Decreed that the Libelants Frances E. Cardinale, Administratrix of the Estate of Frank Joseph Cardinale, Etc., Deceased, and Idaline Jenner Cardinale as owners of the fishing boat "Santa Lucia" recover of and from Respondent Union Oil Company of California, a corporation, one-half of the damages arising out of the matter set forth in the libel herein, with costs of reference hereunder, and

It Is Further Ordered, Adjudged and Decreed that this matter be referred to Joseph Karesh, United States Commissioner, as commissioner to ascertain and compute the amount of the libelants' damages and to report thereon to this Court with all convenient speed, and

It Is Further Ordered, Adjudged and Decreed that Joseph Karesh as commissioner set down a time and place for a hearing to ascertain and compute the amount of libelants' damages.

Dated: This 17th day of October, 1957.

/s/ SYLVESTER J. RYAN,

Judge of the United States
District Court.

Approved as to Form and receipt of a copy of the above and foregoing Interlocutory Decree is hereby acknowledged this 15th day of October, 1957.

BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Union Oil Company of California, a
Corporation.

[Endorsed]: Filed Oct. 21, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Union Oil Company of California, a corporation, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 21, 1957.

Dated: November 6th, 1957.

FREDERIC G. NAVE,
BOYD & TAYLOR;

By /s/ FREDERIC G. NAVE,
Attorneys for Appellant, Union Oil Company of
California, a Corporation.

Receipts of copies acknowledged.

[Endorsed]: Filed Nov. 7, 1957.

[Title of District Court and Cause.]

No. 27364

STIPULATION EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It Is Hereby Stipulated and Agreed, by and between the attorneys for the parties hereto, subject to the order of the court, that the time within which respondent-appellant shall file the record on appeal and docket the appeal from judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including January 13, 1958.

Dated: December 12, 1957.

/s/ MORTON L. SILVERS,

Attorney for Libelants Idalene J. Cardinale, and
Frances E. Cardinale, Administratrix of the
Estate of Frank J. Cardinale, Deceased.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,

Attorneys for Respondents Union Oil Company of
California, a Corporation.

So Ordered: December 17, 1957.

/s/ GEO. B. HARRIS,

United States District Judge.

[Endorsed]: Filed Dec. 17, 1957.

[Title of District Court and Cause.]

No. 27,364

AFFIDAVIT OF FREDERIC G. NAVE

State of California,

City and County of San Francisco—ss.

Frederic G. Nave, being first duly sworn, deposes and says:

That he is an attorney and proctor of law duly licensed and admitted in the above-entitled court and is the proctor attorney for the appellant, Union Oil Company of California, a corporation, and makes this affidavit for and on behalf of said appellant, Union Oil Company of California, a corporation; that heretofore on December 12, 1957, pursuant to stipulation and order of this Court the time within which the appellant, Union Oil Company of California, a corporation, should file its record on appeal and docket the appeal from the judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit was extended to and including January 13, 1958; that affiant has consulted with the reporters who are preparing the record and transcripts and has been advised that due to the press of work that the record and transcript is not yet completed and have requested an extension of time of thirty (30) days for such purposes; that affiant did communicate with attorney Morton L. Silvers of San Francisco, who is the proctor and attorney for the Libelant, Ap-

pellee, and did request the written stipulation consenting to such extension and was advised that he would not grant a stipulation in writing.

/s/ FREDERIC G. NAVE.

Subscribed and sworn to before me this 13th day of January, 1958.

[Seal] /s/ WM. J. FLINN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Jan. 13, 1958.

[Title of District Court and Cause.]

No. 27,364

ORDER EXTENDING TIME

Upon reading the Affidavit of Frederic G. Nave, Proctor for Respondent and Appellant, Union Oil Company of California, a corporation, and for good cause appearing;

It Is Hereby Ordered that the time within which the Respondent, Appellant, Union Oil Company of California, a corporation, shall file the record on appeal and docket the appeal from the judgment entered herein on October 11, 1957, in the United States Court of Appeals for the Ninth Circuit be extended to and including February 12, 1958.

In the United States Court of Appeals
for the Ninth Circuit

No. 15879

IDALENE J. CARDINALE, and FRANCES E.
CARDINALE, Administratrix of the Estate of
FRANK J. CARDINALE, Deceased,

Libelants and Appellees,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation, et al.,

Respondents and Appellants.

DESIGNATION OF THE CONTENTS
OF RECORD ON APPEAL

Appellant, Union Oil Company of California, a corporation, designates the entire record pursuant to Rule 17(6) of the United States Court of Appeals for the Ninth Circuit, including the Reporter's transcript and all exhibits.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Appellant, Union Oil Company of California, a Corporation.

[Endorsed]: Filed Feb. 5, 1958.

[Title of Court of Appeals and Cause.]

No. 15879

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

Appellant, Union Oil Company of California, a corporation, hereby submits its concise statement of points upon which appellant intends to rely in this appeal as follows:

1. The Court erred in finding that the fire, explosion and destruction of the F/V fishing vessel, Santa Lucia, were caused or occasioned by negligence of appellant.

2. The Court erred in finding that the loss of the F/V Santa Lucia did constitute a maritime tort.

3. The Court erred in not finding that the sole cause of the explosion, fire and destruction of the F/V Santa Lucia was due to the unseaworthiness of said F/V Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of said F/V Santa Lucia.

4. The Court erred in finding that Charles Caldwell, the Marine service station employee of appellant, was guilty of negligence contributing to the explosion and fire aboard the F/V Santa Lucia.

5. The Court erred in finding that the appellant, Union Oil Company of California, a corporation, was guilty of negligence contributing to the fire, explosion and destruction of the F/V Santa Lucia.

6. The Court erred in failing to find that the appellant, Union Oil Company of California, a corporation, was not negligent in any manner contributing to the explosion, fire and destruction of the F/V Santa Lucia.

7. The Court erred in making findings of fact that Charles Caldwell, an employee of appellant, Union Oil Company of California, a corporation, was negligent and at fault when he failed to look at the gasoline meter until 58½ gallons had been delivered to the F/V Santa Lucia.

8. The Court erred in its finding of fact that the failure of the said Charles Caldwell, an employee of Union Oil Company of California, a corporation, to look at the gasoline meter until 58½ gallons had been delivered was negligence contributing to or causing the explosion and fire aboard the F/V Santa Lucia and the resulting total destruction thereof.

9. The Court erred in making and entering the findings of fact that the appellant, Union Oil Company of California, a corporation, was negligent and at fault in not exercising reasonable care or prudence and that its failure so to do was the proximate cause of the explosion, fire and destruction of the F/V Santa Lucia.

10. The Court erred in that the findings of fact heretofore mentioned are not supported by any evidence in the trial of said action.

11. The Court erred in that there was no evidence to support its findings of negligence against the said

Charles Caldwell or this appellant theretofore specifically mentioned.

12. The Court erred in adopting conclusions of law inconsistent with his findings of fact.

13. The Court properly concluded that the explosion, fire and destruction aboard and to the F/V. Santa Lucia was due to an unseaworthiness aboard the Santa Lucia and to the personal and active negligence of Frank J. Cardinale, one of the co-owners of the ship, but the conclusions of law holding appellant, Union Oil Company of California, a corporation, to be jointly at fault were not consistent thereon.

14. The Court erred in awarding judgment in favor of libelants against this appellant.

15. The Court erred in overruling the exceptive allegations filed by appellant, which said exceptive allegations set forth the plea of res judicata and equitable estoppel by virtue of a final judgment supported by findings of fact and conclusions of law in action No. 27098, filed and tried in the United States District Court before Honorable Michael J. Roche, Chief Judge.

16. The Court erred in not sustaining the motion to dismiss and exceptions to the libel filed in this action by appellant, Union Oil Company of California, a corporation, which said motion to dismiss and exceptions were based on the findings of fact and conclusions of law entered by the Honorable Michael J. Roche, Chief Judge, United States Dis-

trict Court, in and for the Southern Division of Northern District of California in that certain action entitled "Frances Cardinale, et al., Libelant, vs. Union Oil Company of California, a corporation, et al., Respondents," No. 27098 in that said findings of fact and conclusions of law did constitute *res judicata* and a bar to the prosecution of the action resulting in this appeal.

17. That the Court erred in not adopting the findings of fact and conclusions of law of the said Honorable Michael J. Roche, Chief Judge, United States District Court in said action No. 27098.

Dated: February 6, 1958.

FREDERIC G. NAVE,
BOYD & TAYLOR,

By /s/ FREDERIC G. NAVE,
Proctors for Appellant, Union Oil Company of California, a Corporation.

[Endorsed]: Filed Feb. 5, 1958.

